United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

M.S.T-RR
4-9-71
288

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1018

THE STATE OF GEORGIA, et al.,

Appellants,

-VS-

THE NATIONAL DEMOCRATIC PARTY,
et al.,

Appellees.

On Appeal from the United States District
Court for the District of Columbia

APPENDIX

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C O M P L A I N T

The Plaintiffs above named respectfully show to the Court as follows:

PARTIES
Plaintiffs

1. The plaintiffs in this action are the State of Georgia; Lester G. Maddox, individually and as Governor of the State of Georgia; the State Election Board of Georgia; Ben W. Fortson, Jr., individually and as Secretary of State of the State of Georgia and Chairman of the State Election Board of Georgia; Mrs. Harry B. Williams, W. F. Blanks, and John W. Greer, individually and as members of the State Election Board of Georgia; and Ralph A. Dougherty and Harold N. Hill, individually.

2. The State of Georgia and the State Election Board of Georgia bring this action pursuant to authority granted, inter alia, by Georgia Code Sections 40-1610 (Ga. Laws 1931, pp. 7, 39), 34-202 and 34-203(a) (Ga. Laws 1964, Extra Sess., pp. 26, 35, 36, as amended).

3. The individual plaintiffs are residents and citizens of the State of Georgia and of the United States of America. Said individual plaintiffs are registered and qualified voters of the State of Georgia and as such are entitled to vote for Presidential Electors to be elected in the General Election to be held in

November, 1972 and each four (4) years thereafter.

4. The plaintiffs bring this action in their behalf and in behalf of all qualified voters of the State of Georgia who are aggrieved by the hereinafter alleged dilution and impairment of their right to vote for Presidential Electors. The members of this class are so numerous as to make it impractical to bring them all before the Court. There are questions of law and fact common to the class. The claims of the named plaintiffs are typical of the claims of the class and the named plaintiffs will fairly and adequately protect the interests of the class.

5. The named individual plaintiffs include Democratic and Republican voters.

6. The class represented by plaintiffs includes persons who voted for the Democratic or Republican nominees for the office of Presidential Electors for Georgia in the 1968 General Election. Said class includes residents of Georgia who were too young to vote in the 1968 General Election but who are now registered and eligible to vote in the 1972 General Election. Said class includes persons who were residents of other States at the time of the 1968 General Election and who are now residents of Georgia registered and eligible to vote in the 1972 General Election.

7. The defendants, as hereinafter alleged, are penalizing the plaintiffs and the class they represent, particularly the aforesaid members of the plaintiff class who were too young to

vote in 1968, and those who were residents of other States in 1968, by reason of the failure of the Georgia voters who voted in 1968 to elect either the Democratic or Republican nominees for the office of Presidential Electors.

DEFENDANTS

8. The defendants in this action are as follows:

(a) The National Democratic Party, an unincorporated association, authorized at this time to act by and through the Democratic National Committee, whose offices are located at 2600 Virginia Avenue, N. W., Washington, D. C.

(b) The Democratic National Committee, an unincorporated association, whose offices are located at 2600 Virginia Avenue, N. W., Washington, D. C.

(c) Mr. Channing E. Phillips, individually and as member and representative of the National Democratic Party and the Democratic National Committee and their members, who resides at 1373 Locust Road, N. W., Washington, D. C.

(d) Miss Flaxie Pinkett, individually and as member and representative of the National Democratic Party and the Democratic National Committee and their members, who resides at 1509 Ninth Street, N. W., Washington, D. C.

(e) The National Republican Party, an unincorporated association, authorized at this time to act by and through the Republican National Committee, whose offices are located at

1625 "I" Street, N. W., Washington, D. C.

(f) The Republican National Committee, an unincorporated association, whose offices are located at 1625 "I" Street, N. W., Washington, D. C.

(g) Mr. Carl L. Shipley, individually and as member and representative of the National Republican Party and the Republican National Committee and their members, who resides at 3740 Fordham Road, N. W., Washington, D. C.

(h) Mrs. J. Willard Marriott, individually and as member and representative of the National Republican Party and the Republican National Committee and their members, who resides at 4500 Garfield Street, N. W., Washington, D. C.

9. The named individual defendants are committee members of their respective National Committees.

10. The named defendants are sued as class representatives, to wit: as representatives of their respective National Committees and the members thereof, and as representatives of the political parties to which they belong and the members thereof. The members represented by the named defendants are so numerous as to make it impractical to bring them all before the Court. There are common questions of law and fact. The defenses of the named defendants are typical of the defenses of the class and the named defendants will fairly and adequately protect the interests of the class.

JURISDICTION

11. This Court has jurisdiction of this action and over the parties hereto. This action is brought under Title 28, United States Code, Sections 1343(3), 1343(4) and 2201, and under Title 42, United States Code, Sections 1983, 1985(2), 1985(3), and 1988.

12. The following provisions of the Constitution of the United States are applicable to this action: Article II, Section I; and the Fourteenth Amendment, Sections 1 and 2.

13. This is an action to redress the deprivation, under color of State laws, statutes, regulations, customs and usages, of rights and privileges secured by the Constitution and by acts of Congress providing for equal rights. 28 U.S.C. § 1343(3).

14. This is an action to secure equitable and other relief under the Civil Rights Acts of Congress for the protection of civil rights, including the right to vote. 28 U.S.C. § 1343(4).

15. This is also an action for a declaratory judgment. 28 U.S.C. § 2201.

STATEMENT OF THE CLAIM

16. Article II, Section 1, of the Constitution of the United States provides in pertinent part as follows:

> "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years,

and, together with the Vice President, chosen for the same Term, be elected, as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ."

17. Every four (4) years since 1788, a President and Vice President have been elected. The last such election occurred in 1968 and the next will occur in 1972.

18. There exists in this nation today a two political party system, which system has existed since at least 1868. The two political parties are the defendant National Democratic Party and the defendant National Republican Party.

19. The political party system of nominating conventions to choose candidates for the Presidency began in 1832 in the Democratic Party. The Republican Party met in its first national convention in 1856.

20. Every four (4) years the defendant political parties meet in convention to elect nominees for the offices of President and Vice President.

21. The persons nominated at the respective conventions for the offices of President and Vice President are entitled under the laws of 48 States to have their names placed on the General

Election ballot. In the two remaining States, Alabama and Mississippi, the names of presidential electors representing the two political parties are entitled under state law to be placed on the general election ballot.

22. No person not a nominee of one or the other of the two defendant political parties has been elected President or Vice President in the last 100 years.

23. Nomination of the candidates of one's choice at one of defendants' national conventions as nominee for the office of President or Vice President is the only means available to succeed in electing such candidates to such offices.

24. Failure to become the nominee for the office of President or Vice President of one or the other of the two defendant political parties is equivalent to defeat.

25. Voters in the United States, including voters in plaintiff State, are effectively limited in their choice of President and Vice President to the nominees of one or the other of the defendant political parties.

26. The nominees of the two defendant political parties are chosen in malapportioned National Conventions.

27. The defendant Democratic National Committee is the permanent agency authorized to act in behalf of the defendant National Democratic Party during intervals between Democratic National Conventions, in accordance with the Rules of the defendant Democratic National Party.

28. The defendant National Democratic Party has delegated to the defendant Democratic National Committee the power to apportion among the States, the District of Columbia, and certain territories, the number of votes to be cast at the Democratic National Convention.

29. The defendant Democratic National Committee adopted and there was in use at the 1968 Democratic National Convention the following formula of apportionment:

"Resolved That the distribution of votes, delegates and alternates from the various States and territories to the Democratic National Convention to be held in Chicago on the twenty-sixth day of August, 1968, be as follows:

"(1) Each State shall have three (3) Convention votes for each of the Electors from that State in the Electoral College.

"(2) Each State shall have a popular vote bonus equal to one Convention vote for each 100,000 popular votes, or major fraction thereof, cast in that State in 1964 for Electors who either voted for the nominees of the 1964 Democratic National Convention or who were not elected but ran on the ticket of voting for said nominees: Provided, That (i) there shall be a minimum of one such bonus vote for each State.

"(3) There shall be a victory bonus of ten (10) Convention votes for each State which cast its Electoral

votes for the nominees of the 1964 Democratic National Convention.

"(4) Each member of the Democratic National Committee elected by the 1964 Democratic National Convention or subsequent thereto by the Democratic National Committee shall have one Convention vote, said vote to be personal and to be incapable of exercise by any alternate.

"(5) Canal Zone, Guam, Puerto Rico and the Virgin Islands shall have twenty-three (23) Convention votes, inclusive of the votes of members of the Democratic National Committee, distributed as follows:

"Canal Zone---------- 5

"Guam---------- 5

"Puerto Rico---------- 8

"Virgin Islands---------- 5"

A chart, marked Appendix A, showing the foregoing distribution of convention votes (including popular vote bonuses and victory bonuses) is attached hereto and incorporated herein by reference.

30. The defendant Republican National Committee is the permanent agency authorized to act in behalf of the defendant National Republican Party during intervals between Republican National Conventions, in accordance with the rules of the defendant National Republican Party.

31. The defendant National Republican Party adopted and there was in use at the 1968 Republican National Convention the following formula of apportionment:

"Rule No. 30

"The membership of the next National Convention shall consist of:

"A. Delegates at Large

"1. Four Delegates at Large from each State.

"2. Two additional Delegates at Large for each Representative at Large in Congress from each State.

"3. Nine Delegates at Large for the District of Columbia and three additional Delegates at Large for the District of Columbia if it casts its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election.

"4. Six additional Delegates at Large from each State casting its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election. If any State does not cast its electoral vote, or a majority thereof, for the Republican Nominee in the last preceding Presidential election, but at that election or at a subsequent election held prior to the next Republican

National Convention elects a Republican United States Senator or a Republican Governor then in such event such State shall be entitled to such additional Delegates at Large.

"5. Five Delegates at Large for Puerto Rico and three Delegates at Large for the Virgin Islands.

"B. District Delegates

"1. One District Delegate from each Congressional District casting two thousand (2,000) votes or more for the Republican Nominee for President or for any elector pledged to vote for the Republican Nominee for President in the last preceding Presidential election, or for the Republican Nominee for Congress in the last preceding Congressional election.

"2. One additional District Delegate for each Congressional District casting ten thousand (10,000) votes or more for the Republican Nominee for President or for any elector pledged to vote for the Republican Nominee for President in the last preceding Presidential election, or for the Republican Nominee for Congress in the last preceding Congressional election."

A chart, marked Appendix B, showing the foregoing distribution of convention votes by States is attached hereto and incorporated herein by reference.

32. Under the apportionment formula prescribed by Republican Rule 30 (par. 31 above), each State had at the 1968 Republican National Convention at least 4 delegates at large, plus 2 delegates at large for each Representative at large in Congress, 6 more delegates at large if the State went Republican for President or if it elected a Republican Senator or Governor, plus 1 district delegate for each congressional district which cast at least 2000 votes (and 1 extra for each casting at least 10,000 votes) for any Republican elector for President or a Republican Congressman in the last election. Each such delegate had one vote in the National Convention.

33. The defendant political parties have for the last several or more national conventions not nominated candidates on the basis of one person-one vote.

34. Unless restrained and enjoined, the defendant National Democratic Committee will adopt for use at the 1972 Democratic Convention a formula for apportionment of votes which provides for victory or popular vote bonuses or both.

35. Unless restrained and enjoined, the defendant Republican National Party will use at the 1972 Republican National Convention a formula for apportionment of votes which provides for votes based upon whether or not the voters of a State voted for the Republican nominees for President and Vice President, or Senator, or Governor, or Congressman, which formula gives excess

votes to states which voted for the Republican nominee for President because it also gives extra votes to states in which congressional districts voted for the Republican nominee for President.

36. Eleven States (California, Florida, Massachusetts, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, South Dakota, West Virginia and Wisconsin) and the District of Columbia elect all delegates to the defendants' National Conventions at State primaries, where State laws regulate the primaries and therefore the processes of selection. The number of delegates to be elected at such primaries is controlled by defendants' apportionment formulas.

37. Three States, Illinois, New York and Pennsylvania, elect district delegates to the defendants' National Conventions at State primaries, where State laws regulate the process of selection.

(a) In Illinois, delegates at large are elected by State conventions, the membership in such State conventions being regulated by State law and the members being chosen at county conventions consisting of committeemen elected at primaries regulated by State law.

(b) In New York and Pennsylvania, the delegates at large are elected by State party committees, the members of such State party committees being elected at State primaries, regulated by State law.

(c) The number of delegates to be elected in Illinois, New York and Pennsylvania is controlled by defendants' apportionment formulas.

38. In four States, Alabama, Georgia, Montana and Rhode Island, State law permits the political parties to exercise the option of electing National Convention delegates at State primaries (regulated by State law), or by some other means.

(a) In Alabama, the Democratic Party usually utilizes the primary method, whereas the Republican Party usually utilizes the convention method.

(b) In Georgia, State law permits the political parties to adopt rules and regulations providing for the method of electing delegates to National Conventions. The rules of the Democratic Party provide that such delegates shall be selected by its executive committee chairman. The rules of the Republican Party provide that such delegates shall be elected in the primary or by district and state conventions. The Republican custom has been to elect National Convention delegates by conventions.

(c) In Montana, statutes authorize each political party to provide for the method of selection of delegates to national conventions. Both parties utilize the state convention method. Delegates to state conventions are elected in county conventions. State law requires that

county conventions be composed of precinct committeemen and women elected in state primaries, which primaries are regulated by state law.

(d) In Rhode Island, party state central committees are authorized by statute, at their discretion, to require election of national convention delegates at primary meetings in cities and towns, but both parties select such delegates pursuant to § 17-12-2(2) of the Election Laws of the State of Rhode Island.

(e) The number of such delegates to the defendants' National Conventions is controlled by defendants' apportionment formulas.

39. In three States, Arizona, Arkansas and Louisiana, all national convention delegates are selected by State party committees.

(a) In Arizona, state law requires that each party have a State committee and permits the selection of delegates by such committees.

(b) In Arkansas, state law requires the selection of national convention delegates by state party committees, such state committees being selected at county conventions held as required by law and attended by county members elected in primaries.

(c) In Louisiana, state law permits the selection of delegates by primary, convention or state central committee,

but the political parties do not utilize the primary. Democratic delegates are selected by the state central committee, the composition of which is regulated by law, the membership being elected in the primary. Republican delegates are selected by congressional district and state conventions, as ordered by the state central committee of that party, which committee is regulated by law and elected in the primary.

(d) The number of delegates selected in each of these states is controlled by defendant's apportionment formulas.

40. In twenty-seven States, national convention delegates are selected in state and district conventions.

(a) In Indiana, Maryland and New Mexico, the members of such conventions are elected in primaries which are regulated by state law.

(b) In Colorado, Iowa, Michigan, Minnesota, Mississippi, North Dakota, Texas, Utah and Wyoming, the members of such conventions are chosen by local bodies elected in primaries or caucuses which are regulated by state law.

(c) In Connecticut, Idaho and Kansas, the members of such conventions are derived partly from primaries and partly from meetings of subordinate party units regulated by state law.

(d) In Hawaii, Kentucky, Maine, Tennessee, Vermont and Virginia, the members of such conventions are elected

at meetings of subordinate party units. In Vermont the membership is regulated by state law. In Hawaii and Kentucky the conventions are regulated by state law.

(e) In Delaware, Missouri, Nevada, North Carolina, Oklahoma and South Carolina, the members of such conventions are chosen at county conventions derived from local meetings. In Missouri, Nevada, North Carolina, Oklahoma and South Carolina, they are regulated by state law.

41. Alaska, Delaware, Maine, Oklahoma, Tennessee, Virginia and Washington permit the political parties to choose the method of selecting national convention delegates.

42. In each of the fifty states, the recognition, organization and government of the Democratic and Republican parties is controlled by state law.

43. In each of the fifty states, the selection of delegates to national conventions is governed by state law in either (a) the election of such delegates in primaries regulated by state law, (b) the election of such delegates in state or district conventions, which conventions are regulated by state law, or whose members are chosen in primaries regulated by state law or whose members are chosen by persons chosen in primaries regulated by state law, or (c) the selection of such delegates by party organizations created and subject to regulation by state law.

44. In each of the fifty States, the method of selecting delegates to national conventions is controlled by, or is subject to the control of, state law, whereas the number of delegates to be selected is controlled by defendants' apportionment formulas.

45. In 1968, fourteen states, California, Florida, Illinois, Indiana, Massachusetts, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, West Virginia, Wisconsin, held preferential presidential primaries, regulated by state law.

46. Fifteen states, Arkansas, California, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, and Wisconsin each have statutory instructions applicable to voting by delegates at national conventions.

47. In forty-eight states, the persons nominated at the respective national conventions conducted by defendants are entitled under state law to have their names placed on the general election ballots as the nominees of their respective political parties. In such states, votes cast for the party nominees for President and Vice President count toward the election of presidential electors supporting such nominees. In the two remaining States, Alabama and Mississippi, the names of presidential electors representing the two political parties are entitled under state law to be placed on the general election ballot.

48. All States (except Arizona) and the District of

Columbia have statutory instructions governing their Presidential Electors.

49. All fifty States and the District of Columbia have laws, statutes, regulations, customs or usages which bear directly or indirectly upon the selection of delegates to national conventions, the election of presidential electors, and the election of the President and Vice President of the United States.

50. By their laws, statutes, regulations, customs and usages, the States and the District of Columbia have made the national conventions of the defendant political parties their agents for the selection of persons to be voted upon for the Office of President and Vice President of the United States.

51. The States and the District of Columbia have made the defendants' national conventions an integral part of the presidential election process of each State and the District of Columbia.

52. The States and the District of Columbia have afforded the defendants the means of depriving plaintiffs and the class they represent of their constitutional rights.

53. Unless defendants' apportionment formulas are revised, plaintiffs and the class they represent will be under represented on the basis of one person-one vote at the defendants' 1972 national conventions.

54. By reason of the malapportionment of defendants' national conventions, plaintiffs are being deprived by defendants, under color of state laws, statutes, regulations, customs and usages, of rights and privileges secured by Article II, Section I, of the Constitution of the United States and Sections 1 and 2 of the Fourteenth Amendment thereto.

55. Plaintiffs and the class they represent are being denied the privileges of citizens of the United States and the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and are being denied the right to vote on a one person-one vote basis as guaranteed to them by said amendment, by virtue of the malapportioned national conventions conducted by defendants.

56. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs herein complained of, and thus bring this action for declaratory and injunctive relief, to avoid delay and a multiplicity of suits and further irreparable injury and damage to plaintiffs and others similarly situated.

RELIEF

WHEREFORE, the plaintiffs respectfully pray, as follows:

a) That declaratory judgment issue, holding and declaring that the National Conventions of the Democratic and Republican Parties are malapportioned; and

b) That declaratory judgment issue, holding and declaring that such malapportionment violates plaintiffs' constitutional and civil rights; and

c) That the defendants, their officers, members, and successors, and those they represent, be restrained and enjoined from nominating candidates for the office of President or Vice President in a malapportioned National Convention; and

d) That the Court grant such additional and other relief as may be necessary or proper in the premises.

APPENDIX A

"Nomination and Election of the President and Vice President of the United States, including the Manner of Selecting Delegates to National Political Conventions," compiled under the direction of Francis R. Valeo, Secretary of the Senate, January, 1968, pp.37-38.

APPORTIONMENT OF VOTES, DELEGATES, AND ALTERNATES FOR THE 1968 DEMOCRATIC CONVENTION, APPROVED JAN. 8, 1968 (INCLUDING 1964 APPORTIONMENT)

State	1968 convention vote	National Committee members [1]	Maximum number of delegates to be selected [2] (from cols. 2E and 2D)	Maximum number of alternates to be selected	Maximum total delegation [3]	Basis for 1968 convention votes and delegates					Basis for 1964 convention votes and delegates				1968 vote gain or loss over 1964
						3 each elector	1 each 100,000 popular vote for nominee	10 bonus, 1964 victory	Total votes [4]	Maximum number of delegates [5]	1 each 100,000 popular vote for nominee	10 bonus, 1960 victory	Total votes [6]	Total delegates [7]	
	(A)	(B)	(C)	(D)	(E)	(2A)	(2B)	(2C)	(2D)	(2E)	(2F)	(2G)	(2H)	(2J)	(2K)
Alabama	32	2	66 with 30 votes [8]	30	98	30			30	[8] 56	1	8	38	56	-8
Alaska	22	2	30 with 29 votes	20	42	0	1	10	20	22	1		10	14	+10
Arizona	18	2	32 with 17 votes [9]	17	51	15	2		17	[9] 32	2		17	32	
Arkansas	30	2	52 with 31 votes [9]	31	85	18	3	10	31	[9] 52	2	10	30	52	+1
California	174	2	172 with 172 votes	172	346	120	42	10	172	172	32		152	150	+20
Colorado	15	2	40 with 33 votes [9]	33	75	18	6	10	34	[9] 60	3		21	48	+12
Connecticut	44	2	42 with 42 votes	42	86	24	8	10	42	42	7	10	41	41	+1
Delaware	22	2	30 with 20 votes	20	42	0	1	10	20	20	1	10	20		
Florida	63	2	81 with 61 votes	61	126	42	9	10	61	61	7		49	37	+12
Georgia	45	2	84 with 41 votes	41	107	36	5		41	[8] 64	8	10	51	61	-10
Hawaii	26	2	24 with 24 votes	24	50	12	2	10	24	24	1	10	23	22	+1
Idaho	23	2	24 with 23 votes [9]	23	49	12	1	10	23	[9] 24	1		13	13	+10
Illinois	118	2	136 with 116 votes [9]	116	254	78	38	10	116	[9] 136	24	10	112	132	+4
Indiana	63	2	66 with 61 votes [9]	61	129	30	12	10	61	[9] 66	10		49	54	+12
Iowa	48	2	50 with 46 votes [9]	46	96	27	7	10	44	[9] 50	6		33	39	+11
Kansas	35	2	40 with 36 votes [9]	36	78	21	6	10	36	[9] 40	4		25	36	+11
Kentucky	46	2	60 with 44 votes [9]	44	106	27	7	10	44	[9] 60	8		32	46	+12
Louisiana	36	2	60 with 34 votes [9]	34	96	30	4		34	[9] 50	4	10	44	54	-10
Maine	27	2	28 with 25 votes [9]	25	55	12	3	10	25	[9] 28	2		14	26	+11
Maryland	49	2	47 with 47 votes	47	98	30	7	10	47	47	6	10	46	46	+1
Massachusetts	72	2	80 with 70 votes [9]	70	152	42	18	10	70	[9] 80	15	10	67	77	+3
Michigan	96	2	101 with 91 votes [9]	91	196	63	21	10	94	[9] 110	17	10	90	100	+4
Minnesota	52	2	60 with 50 votes [9]	50	112	30	10	10	50	[9] 60	8	10	48	58	+2
Mississippi	24	2	44 with 22 votes [9]	22	68	21	1		22	[9] 44	1		22	44	
Missouri	60	2	76 with 58 votes [9]	58	136	36	12	10	58	[9] 76	10	10	58	76	+2
Montana	26	2	30 with 24 votes [9]	24	56	12	2	10	24	[9] 30	1		13	26	+4
Nebraska	30	2	30 with 28 votes [9]	28	60	18	2	10	28	[9] 30	2		17	29	+11
Nevada	22	2	26 with 20 votes [9]	20	50	0	1	10	20	[9] 26	1	10	20	22	
New Hampshire	26	2	24 with 24 votes	24	56	12	2	10	24	24	1		13	13	+11
New Jersey	82	2	90 with 80 votes	80	182	51	19	10	80	[9] 80	14	10	74	80	+6
New Mexico	26	2	32 with 24 votes [9]	24	84	12	2	10	24	[9] 32	2	10	24	32	

APPENDIX A (Continued)

"Nomination and Election of the President and Vice President of the United States, including the Manner of Selecting Delegates to National Political Conventions," compiled under the direction of Francis R. Valeo, Secretary of the Senate, January, 1968, pp.37-38.

APPORTIONMENT OF VOTES, DELEGATES, AND ALTERNATES FOR THE 1968 DEMOCRATIC CONVENTION, APPROVED JAN. 8, 1968 (INCLUDING 1964 APPORTIONMENT)—Continued

State	1968 convention vote	National Committee members [1]	Maximum number of delegates to be selected [2] (from cols. 2E and 2D)	Maximum number of alternates to be selected	Maximum total delegation [3]	Basis for 1968 convention votes and delegates					Basis for 1964 convention votes and delegates				1968 vote gain or loss over 1964
						3 each elector	1 each 100,000 popular vote for nominees	10 bonus, 1964 victory	Total votes [4]	Maximum number of delegates [5]	1 each 100,000 popular vote for nominees	10 bonus, 1960 victory	Total votes [4]	Total delegates [5]	
	(A)	(B)	(C)	(D)	(E)	(2A)	(2B)	(2C)	(2D)	(2E)	(2F)	(2G)	(2H)	(2J)	(2K)
New York	190	2	226 with 188 votes [6]	188	416	177	49	10	188	[6] 226	38	10	177	226	+11
North Carolina	59	2	72 with 57 votes [6]	57	131	57	6	10	57	[6] 72	7	10	58	72	-1
North Dakota	25	2	23 with 23 votes	23	48	12	1	10	23	23	1		13	23	+10
Ohio	115	2	126 with 113 votes [6]	113	241	78	25	10	113	[6] 126	16		97	126	+13
Oklahoma	41	2	36 with 33 votes [6]	33	97	24	5	10	39	[6] 36	4		28	36	+11
Oregon	25	2	33 with 33 votes	33	68	18	5	10	33	33	4		22	32	+11
Pennsylvania	139	2	160 with 128 votes [6]	128	280	87	21	10	128	[6] 160	26	10	123	160	+5
Rhode Island	27	2	32 with 25 votes [6]	25	62	12	3	10	25	[6] 32	3	10	23	32	.....
South Carolina	28	2	40 with 28 votes [6]	28	68	24	1	.....	28	[6] 40	3	10	35	40	-10
South Dakota	28	2	24 with 24 votes	24	50	12	1	10	24	24	1		13	28	+11
Tennessee	51	2	64 with 49 votes [6]	49	115	33	1	10	49	[6] 64	6		35	64	+11
Texas	104	2	130 with 102 votes [6]	102	234	75	17	10	102	129	12	10	97	130	+5
Utah	26	2	24 with 24 votes	24	50	12	2	10	24	24	2		14	24	+10
Vermont	22	2	29 with 22 votes	20	42	9	1	10	20	20	1	.....	10	16	+10
Virginia	54	2	64 with 52 votes [6]	52	118	36	6	10	52	[6] 64	6		40	64	+12
Washington	47	2	52 with 45 votes [6]	45	99	27	8	10	45	[6] 52	6		33	52	+12
West Virginia	38	2	48 with 35 votes [6]	36	86	21	5	10	36	[6] 45	4	10	35	48	+1
Wisconsin	59	2	60 with 57 votes [6]	57	119	36	11	10	57	[6] 60	8		41	60	+13
Wyoming	22	2	26 with 20 votes [6]	20	48	9	1	10	20	[6] 26	1		13	26	+7
District of Columbia	23	2	21 with 21 votes	21	44	9	3	10	21	21	.....	.....	14	18	+7
Canal Zone	3	2	6 with 3 votes [6]	3	11	.....	.....	.....	3	[6] 6	.....	.....	3	6	.....
Guam	3	2	.....do	3	11	.....	.....	.....	3	[6] 6	.....	.....	3	6	+3
Puerto Rico	8	2	12 with 6 votes [6]	6	20	.....	.....	.....	6	[6] 12	.....	.....	6	12	.....
Virgin Islands	3	2	6 with 3 votes [6]	3	11	.....	.....	.....	3	[6] 6	.....	.....	3	6	.....
Total	[7] 2,622	110	2,959 with 2,312 votes	2,312	5,611	.....	.....	.....	2,312	2,959	.....	.....	2,208	2,944	+296

[1] Each national committee member has an automatic vote within his delegation; no alternates may be submitted.
[2] Excludes national committee members.
[3] Includes national committee members.
[4] Applying the proviso that "a State shall be entitled to select the same number of individuals to serve as delegates as it was authorized to select" for the 1964 convention, the States would send this number of delegates (figures from col. 2J).
[5] Needed to nominate: 1,312.
[6] Including 3 votes for each presidential elector but excluding 2 votes (one each) for national committeeman and national committeewoman.

APPENDIX B

"Nomination and Election of the President and Vice President of the United States, including the Manner of Selecting Delegates to National Political Conventions," compiled under the direction of Francis R. Valeo, Secretary of the Senate, January, 1968, p.48.

APPORTIONMENT OF DELEGATES TO THE 1968 REPUBLICAN NATIONAL CONVENTION, APPROVED SEPT. 9, 1967 (INCLUDING 1964 APPORTIONMENT)

State	Apportionment of delegates		Number of delegates at convention			Alternates, 1968	Total delegation, 1968
	Delegates at large	Delegates from each congressional district	1968	1964	Gain or loss		
Alabama	10	2	26	20	+6	26	52
Alaska	12	----	12	12	----	12	24
Arizona	10	2	16	16	----	16	32
Arkansas	10	2	18	12	+6	18	36
California	10	2	86	86	----	86	172
Colorado	10	2	16	16	----	16	32
Connecticut	4	2	16	16	----	16	32
Delaware	12	----	12	12	----	12	24
District of Columbia	9	----	9	9	----	9	18
Florida	10	2	34	34	----	34	68
Georgia	10	2	30	24	+6	30	60
Hawaii	14	----	14	8	+6	14	28
Idaho	10	2	14	14	----	14	28
Illinois	10	2	58	58	----	58	116
Indiana	4	2	26	32	−6	26	52
Iowa	10	2	24	24	----	24	48
Kansas	10	2	24	24	----	24	48
Kentucky	10	2	28	20	+6	28	56
Louisiana	10	2	14	14	----	14	28
Maine	10	2	26	20	+6	26	52
Maryland	10	2	34	34	----	34	68
Massachusetts	10	2	48	48	----	48	96
Michigan	10	2	26	26	----	26	52
Minnesota	10	2	33	26	+7	33	66
Mississippi	10	2	24	24	----	24	48
Missouri	4	2	14	14	----	14	28
Montana	10	2	16	16	----	16	32
Nebraska	10	2	12	6	+6	12	24
Nevada	12	----	8	14	−6	8	16
New Hampshire	4	2	46	46	----	46	92
New Jersey	10	2	92	92	----	92	184
New Mexico	14	----	26	26	----	26	52
New York	10	2	8	14	−6	8	16
North Carolina	4	2	58	58	----	58	116
North Dakota	4	2	22	22	----	22	44
Ohio	10	2	64	64	----	64	128
Oklahoma	10	2	8	8	----	8	16
Oregon	10	2	14	14	----	14	28
Pennsylvania	10	2	22	16	+6	22	44
Puerto Rico	5	----	14	14	----	14	28
Rhode Island	10	2	58	58	----	58	116
South Carolina	10	2	8	14	−6	8	16
South Dakota	10	2	12	12	----	12	24
Tennessee	10	2	24	30	−6	24	48
Texas	10	2	6	6	----	6	12
Utah	4	2	24	24	----	24	48
Vermont	12	----	14	14	----	14	28
Virginia	4	2	30	30	----	30	60
Virgin Islands	3	----	12	12	----	12	24
Washington	10	2	3	3	----	3	6
West Virginia	4	2	24	24	----	24	48
Wisconsin	10	2	14	14	----	14	28
Wyoming	12	----	30	30	----	30	60
Total number of delegates	----	----	[1]1,333	[2]1,308	+25	1,333	2,666

[1] Needed to nominate: 667
[2] Needed to nominate: 655

M-282
(Rev. 1-1-67)

RETURN ON SERVICE OF WRIT

United States of America

..... DISTRICT OF COLUMBIA

The STATE OF GEORGIA Clerk's No. CA 882-70

vs.

The NATIONAL DEMOCRATIC PARTY U.S. Marshal's No. .....

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I endeavored to serve (served) the annexed S/C (Writ) on the therein-named The REPUBLICAN NATIONAL COMMITTEE. (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was done in endeavoring to serve) [illegible] AGENT (Name of individual or agent of company, corporation, etc.)

personally at (if endeavor—show addresses where endeavors made) 1625 EYE ST N.W. WASHINGTON (Address—Street number, apartment number, rural route) DC (State)

at 11:30 a.m./p.m., on the 30 day of MARCH, 1970.

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19....,

I received the within ..... and that after

diligent search, I am unable to find the within named .....

..... 6 ..... within said district.

Marshal's fees .....

Mileage .....

Anthony E. PAPA
United States Marshal.

By [illegible] Calamatt
Deputy.

- 31 -

RETURN ON SERVICE OF WRIT

United States of America

..... DISTRICT OF Columbia

State of Georgia et al vs. National Democratic Party et al

Clerk's No. CA 882-70

U.S. Marshal's No. .....

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I endeavored to serve / served the annexed Summons & Complaint

on the therein-named National Republican Party (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was done in endeavoring to serve) Mike Jones (Name of individual or agent of company, corporation, etc.) Agent

personally at (if endeavor—show addresses where endeavors made) 1625 I St NW (Address—Street number, apartment number, rural route, etc.) Washington (City), D.C. (State) in the said District

at 11:15 a.m./p.m., on the 30th day of March, 1970

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19....,

I received the within ..... and that after

diligent search, I am unable to find the within named .....

..... within said district.

Rec'd Served in Duplicate 5

Marshal's fees .....

Mileage .....

A. E. Pelle
United States Marshal.

By James B Clarke
Deputy

GPO: 1967—O-280-822

STIPULATION EXTENDING TIME

It is hereby stipulated between counsel for plaintiffs and counsel for defendants The National Republican Party, The Republican National Committee, Carl L. Shipley, and Mrs. J. Willard Marriott, that the time within which said defendants may answer, move or otherwise plead with respect to the complaint herein be extended to and including May 25, 1970.

/s/HAROLD N. HILL JR.
HAROLD N. HILL, JR.
132 State Judicial Building
Atlanta, Georgia 30334
Tel. No.: (404) 525-0401
Attorney for Plaintiffs

APPROVED:

/s/ McGuire
JUDGE
May 13, 1970

/s/FRED C. SCRIBNER, JR.
FRED C. SCRIBNER, JR.
General Counsel
Republican National Committee

/s/E. VICTOR WILLETTS, JR.
E. VICTOR WILLETTS, JR.
1200 Eighteenth Street, N. W.
Suite 1209
Washington, D. C. 20036
Tel. No.: (202) 338-6510
Attorneys for Defendants
The National Republican Party
The Republican National Committee
Carl L. Shipley
Mrs. J. Willard Marriott

MOTION FOR PRELIMINARY INJUNCTION
MOTION FOR SUMMARY JUDGMENT

Come now the plaintiffs in the above styled action and respectfully move the Court as follows:

1.

For a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, restraining and enjoining the defendants named in the complaint, those they represent and their officers, members and successors, from nominating candidates for the office of President or Vice President in malapportioned national conventions.

2.

For summary judgment, pursuant to Rules 56 and 57 of the Federal Rules of Civil Procedure, in favor of plaintiffs, declaring that the national presidential nominating conventions of the National Democratic and Republican Parties are malapportioned, and that such malapportionment violates plaintiffs' constitutional and civil rights. There is no genuine issue as to any material fact and plaintiffs are entitled to such summary declaratory judgment as a matter of law.

3.

These motions for preliminary injunction and summary judgment are based upon the following:

1. The admissions contained in defendants' answers to plaintiffs' complaint.
2. The affidavits of plaintiffs being filed concurrently herewith.
3. Plaintiffs' Requests for Admissions to Defendant Republican National Committee and said defendants' admissions in response thereto.
4. Plaintiffs' Interrogatories to Defendant Republican National Committee and said defendants' answers in response thereto.
5. Plaintiffs' Requests for Admissions to Defendant Democratic National Committee and said defendants' admissions in response thereto.
6. Plaintiffs' Interrogatories to Defendant Democratic National Committee and said defendants' answers in response thereto.
7. Judicial Notice as authorized by law.
8. The 1960 U. S. Census and computations derived therefrom.

WHEREFORE, plaintiffs pray that these motions be inquired into and granted.

STATISTICS, AFFIDAVITS AND LAWS IN SUPPORT OF PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT

Included herein are statistics, affidavits and laws in support of plaintiffs' motions for preliminary injunction and summary judgment.

Attached hereto is a table showing the population of each state according to the 1960 U. S. Census, the vote of each state delegation to the 1968 National Conventions, and certain computations derived therefrom.

The following affidavits are included herein:

1) Affidavit of Lester G. Maddox;

2) Affidavit of Ben W. Fortson, Jr.;

3) Affidavit of Mrs. Harry B. Williams;

4) Affidavit of W. F. Blanks;

5) Affidavit of John W. Greer;

6) Affidavit of Ralph A. Dougherty;

7) Affidavit of Harold N. Hill.

Also attached hereto is book entitled NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, INCLUDING THE MANNER OF SELECTING DELEGATES TO NATIONAL POLITICAL CONVENTIONS, compiled under the direction of Francis R. Valeo, Secretary of the Senate, by Richard D. Hupman, Senate Library, and Robert L. Tienken, Legislative Reference Service, Library of

Congress, January, 1968. Commencing at page 65 (and going through page 251) of said book, the Court will find the laws of the fifty states and the District of Columbia which show the "state action" regarding the selection of national convention delegates and of nominees for the offices of presidential electors.

This compilation of state laws is offered as an aid to the Court in taking judicial notice of them.*

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* In Lamar v. Micou, 114 U.S. 218, 223 (1885), the Court said:

> "The law of any state of the Union, whether depending upon statutes or upon judicial opinion, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."

Elwood v. Flannigan, 104 U.S. 562, 568 (1882); Wm. J. Lemp. Brewing Co. v. Ems Brewing Co., 164 F.2d 290, 293 (7th Cir. 1947); Moore v. Pywell, 29 D.C.App. 312 (1907).

	STATE	POPULATION	PERCENT OF POPULATION	1968 DEMOCRATIC NATIONAL CONVENTION: Actual No. Votes	% of Vote	Av. Pop. Per Vote	Ideal No. Votes	Over (Under)	% Var. Fm. Norm	1968 REPUBLICAN NATIONAL CONVENTION: Actual No. Votes	% of Vote	Av. Pop. Per Vote	Ideal No. Votes	Over (Under)	% Var. Fm. Norm
1	ALABAMA	3,266,740	1.622	32	1.226	102,086	48	(16)	+9.27	26	1.051	125,643	26	-	- .460
2	ALASKA	226,167	.126	22	.939	10,280	3	19	-89.09	12	.900	18,847	2	10	-85.99
3	ARIZONA	1,302,161	.726	19	.725	68,536	19	—	+ .21	16	1.200	81,385	10	6	-39.50
4	ARKANSAS	1,784,272	.996	33	1.257	54,129	24	7	-24.85	18	1.350	99,237	13	5	-24.33
5	CALIFORNIA	19,957,274	11.145	174	6.636	90,329	230	(56)	+ 3.08	86	6.452	182,755	117	(31)	+35.85
6	COLORADO	1,753,947	.978	35	1.335	50,113	24	9	-20.73	18	1.350	97,441	13	5	-22.57
7	CONNECTICUT	3,535,234	1.974	44	1.678	57,619	37	7	-15.75	16	1.200	158,452	19	(3)	+17.78
8	DELAWARE	446,292	.249	23	.939	20,286	7	16	-70.34	12	.900	37,191	3	9	-73.36
9	DISTRICT OF COLUMBIA	756,510	.422	23	.877	33,315	11	12	-51.93	9	.675	84,056	6	3	-50.40
10	FLORIDA	4,951,560	2.764	63	2.401	78,596	72	(9)	+ 14.92	34	2.551	145,634	37	(3)	+ 9.26
11	GEORGIA	3,943,116	2.199	43	1.640	91,700	68	(15)	+ 34.08	30	2.251	131,437	29	1	- .880
12	HAWAII	632,772	.353	26	.991	24,337	9	17	-64.42	14	1.050	45,198	5	9	-66.46
13	IDAHO	667,191	.372	25	.953	26,688	10	15	-60.98	14	1.050	47,656	5	9	-64.72
14	ILLINOIS	10,081,158	5.627	118	4.500	85,434	147	(29)	+ 20.92	58	4.351	173,813	76	(17)	+11.20
15	INDIANA	5,162,228	2.880	63	2.403	81,924	66	(3)	+ 8.21	26	1.951	198,546	36	(9)	+33.30
16	IOWA	2,757,537	1.538	46	1.754	59,946	40	6	-12.35	24	1.801	114,897	21	3	-10.69
17	KANSAS	2,178,611	1.215	38	1.449	57,332	32	6	-16.17	20	1.500	108,930	16	4	-19.03
18	KENTUCKY	3,038,156	1.695	46	1.754	66,046	44	2	- 3.43	24	1.801	126,589	23	1	- .886
19	LOUISIANA	3,257,022	1.816	36	1.373	90,473	48	(12)	+31.28	26	1.951	125,270	24	2	- 6.87
20	MAINE	993,663	.554	27	1.030	36,802	14	13	-61.51	14	1.050	70,833	7	7	-49.54
21	MARYLAND	3,922,399	2.187	59	2.251	66,482	45	4	- 7.48	26	1.951	150,861	29	3	- 1.36
22	MASSACHUSETTS	5,148,578	2.871	72	2.746	71,508	55	(3)	+ 4.56	35	2.627	147,102	39	(4)	+12.66
23	MICHIGAN	8,875,083	4.949	96	3.664	92,449	114	(18)	+19.15	48	3.601	184,897	57	(10)	+21.15
24	MINNESOTA	3,413,864	1.904	52	1.988	65,651	50	2	- 4.01	20	1.501	170,693	25	1	- 2.40
25	MISSISSIPPI	2,178,141	1.215	39	1.489	55,850	32	(8)	+32.70	20	1.500	108,907	16	4	-19.06
26	MISSOURI	4,319,813	2.409	60	2.293	71,997	63	(3)	+ 5.17	24	1.801	179,992	32	(8)	+33.80
27	MONTANA	694,409	.387	26	.992	26,708	10	16	-62.05	14	1.050	49,601	5	9	-64.12
28	NEBRASKA	1,411,330	.787	30	1.144	47,044	24	6	- 3.21	16	1.200	88,208	10	6	-39.43
29	NEVADA	285,278	.159	22	.839	12,967	4	18	-81.04	12	.900	23,773	2	10	-91.83
30	NEW HAMPSHIRE	606,921	.338	26	.992	23,343	9	17	-65.87	8	.600	75,865	5	3	-44.61
31	NEW JERSEY	6,066,782	3.383	82	3.127	73,985	85	(7)	+ 8.18	40	3.000	151,669	45	(5)	+12.74
32	NEW MEXICO	951,023	.530	26	.992	36,577	14	12	-46.52	14	1.050	67,930	7	7	-49.02
33	NEW YORK	16,782,304	9.358	190	7.246	88,328	246	(55)	+29.15	92	6.902	182,416	105	(33)	+23.60
34	NORTH CAROLINA	5,082,059	2.541	67	2.550	75,823	67	(8)	+ 1.91	26	1.951	195,236	34	(8)	+30.26
35	NORTH DAKOTA	617,761	.353	25	.953	24,698	9	16	-63.01	8	.600	77,055	5	3	-44.23
36	OHIO	10,652,017	5.413	115	4.386	92,626	142	(27)	+23.41	58	4.351	183,655	72	(14)	+29.40
37	OKLAHOMA	2,328,284	1.298	41	1.564	56,787	34	7	-16.97	22	1.650	105,831	13	9	-26.53
38	OREGON	1,768,687	.986	35	1.336	50,534	24	9	- 2.11	18	1.350	98,260	13	5	- 2.96
39	PENNSYLVANIA	11,844,520	6.612	130	4.956	91,074	166	(36)	+27.31	64	4.801	185,070	84	(20)	+31.47
40	RHODE ISLAND	859,488	.479	27	1.030	31,833	12	15	-63.46	14	1.050	61,392	8	6	-43.36
41	SOUTH CAROLINA	2,382,594	1.329	28	1.068	85,093	35	(7)	+24.42	22	1.650	108,299	13	9	-41.50
42	SOUTH DAKOTA	665,178	.380	26	.992	25,584	10	16	-61.73	14	1.050	47,584	5	9	-64.87
43															
44															
45															
46															
47															

STATE	POPULATION	PERCENT OF POPULATION	1968 DEMOCRATIC NATIONAL CONVENTION: Actual No. Votes	% of Vote	Av. Pop. Per Vote	Ideal No. Votes	Over (Under)	% Var. Fm. Norm.	1968 REPUBLICAN NATIONAL CONVENTION: Actual No. Votes	% of Vote	Av. Pop. Per Vote	Ideal No. Votes	Over (Under)	% Var. Fm. Norm.
TENNESSEE	4,067,049	1.984	51	1.965	69,943	52	(1)	+ 2.27	28	2.101	122,304	31	(3)	- 8.80
TEXAS	9,579,677	5.043	104	3.966	92,113	140	(36)	+34.68	56	4.201	171,065	71	(15)	+22.16
UTAH	890,627	.497	26	.992	34,255	13	13	-49.91	8	.600	111,328	7	1	-17.24
VERMONT	389,881	.217	22	.839	17,722	6	16	-71.09	12	.900	32,490	3	9	-35.85
VIRGINIA	4,966,949	2.212	54	2.059	23,462	58	(4)	+ 7.41	34	1.891	145,203	29	(5)	+23.27
WASHINGTON	3,853,214	1.891	47	1.793	60,706	42	5	-11.24	24	1.801	118,683	21	3	-11.63
WEST VIRGINIA	1,860,421	1.037	38	1.449	48,958	27	11	-28.42	14	1.050	132,887	14	-	- .22
WISCONSIN	3,951,777	1.804	69	2.630	66,979	58	1	- .07	30	2.251	131,725	29	1	- 3.08
WYOMING	330,066	.184	22	.839	15,003	5	17	-76.06	12	.900	27,505	3	9	-77.65
CANAL ZONE			5	.191				-100.00	0					
GUAM			6	.191				-100.00	0					
PUERTO RICO			8	.305				-100.00	6	.375				+100.00
VIRGIN ISLANDS			6	.191				-100.00	3	.225				+100.00
	179,323,175	100.000%	2622	100.000%		2622			1333	100.000%		1333		
NEEDED TO NOMINATE:			1312						667					

IDEAL (MEAN) POPULATION PER CONVENTION VOTE:

Democrat - 68,392

Republican -134,526

MAXIMUM OVER AND UNDER REPRESENTATION FROM IDEAL:

Democrat - Alaska 84.97% overrepresented;
Alabama 49.27% under-represented.

Republican - Alaska 85.99% over-represented;
California 35.85% under-represented.

RATIO OF MOST POPULOUS STATE (MOST PEOPLE PER VOTE) TO LEAST POPULOUS STATE:

Democrat - 9.93 (Alaska) to 1 (Alabama).

Republican - 9.70 (Alaska) to 1 (California)

AVERAGE POPULATION DIFFERENCE BETWEEN MOST POPULOUS STATE AND LEAST POPULOUS STATE:

Democrat - 91,806

Republican -163,911

MOTION TO DISMISS

Now come the Defendants the Republican National Committee and Mrs. J. Willard Marriott and, pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure move the Court to dismiss this action because the Complaint fails to state a claim against these Defendants upon which relief can be granted.

This Motion is based upon the pleadings, including Answers to Interrogatories, Admissions and Affidavits, and is supported by the Statement of Points and Authorities submitted herewith.

The said Defendants respectfully request that the Court assign this Motion for oral hearing.

MOTION FOR SUMMARY JUDGMENT

Now come the Defendants the Republican National Committee and Mrs. J. Willard Marriott and move the Court, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, for Summary Judgment on their behalf dismissing this action on the ground that there is no genuine issue as to any material fact and that these Defendants are entitled to such summary judgment as a matter of law.

This Motion is based upon the pleadings, including Answers to Interrogatories, Admissions and Affidavits.

The said Defendants respectfully request that the Court assign this motion for oral hearing.

MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT (FILED BY DEFENDANTS THE NATIONAL DEMOCRATIC PARTY, THE DEMOCRATIC NATIONAL COMMITTEE, CHANNING E. PHILLIPS AND FLAXIE M. PINKETT)

The National Democratic Party, the Democratic National Committee, Channing E. Phillips and Flaxie M. Pinkett (hereinafter collectively referred to as "the Democratic defendants") hereby move the Court to dismiss the complaint in this proceeding, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, on the ground that the complaint fails to state a claim upon which relief can be granted. The Democratic defendants also move, in the alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In support of these motions, the Democratic defendants submit the following documents:

1. A memorandum in support of motion to dismiss the complaint or, in the alternative, for summary judgment.

2. The Affidavit of Lawrence F. O'Brien, Chairman of the Democratic National Committee, together with Exhibit A to Mr. O'Brien's Affidavit, "Mandate for Reform," the report of the Commission on Party Structure and Delegate Selection, chaired by Senator George S. McGovern.

3. The Affidavit of Howard G. Gamser, Counsel to the

Rules Commission established by the Democratic National Committee, together with Exhibit A (a copy of "Issues and Alternatives," a study guide prepared by the Rules Commission) and Exhibit B (excerpts relating to delegate allocation from statements presented to the Rules Commission) to Mr. Gamser's Affidavit.

For the reasons set forth in the documents referred to above, the Democratic defendants request the Court to grant their motion to dismiss the complaint or, in the alternative, their motion for summary judgment.

AFFIDAVIT OF LAWRENCE F. O'BRIEN

WASHINGTON,)
) ss:
DISTRICT OF COLUMBIA)

LAWRENCE F. O'BRIEN, being first duly sworn, deposes as follows:

1. I am Chairman of the Democratic National Committee.

2. The Democratic Party is today in the process of a searching reexamination of every phase of Party life to determine how the Party can be modernized and made more democratic to meet the needs of the nation and the Party in the 1970's.

3. Two historic efforts are presently being undertaken as part of that reexamination. Both of these efforts were undertaken in accordance with the will of the Democratic Party as expressed in resolutions adopted at the 1968 Democratic National Convention. Both efforts were officially launched in early 1969 when my predicessor, Senator Fred R. Harris, announced the creation of the Commission on Party Structure and Delegate Selection (chaired by Senator George McGovern, and known as the McGovern Commission) and the Rules Commission (chaired by Congressman James G. O'Hara, and known as the O'Hara Commission).

4. The mandate of the McGovern Commission is directed toward assuring that everyone is given a full and meaningful

opportunity to participate in the processes by which states select delegates to the quadrennial Democratic Conventions.

5. The mandate of the O'Hara Commission, on the other hand, is directed toward the conduct of the National Convention itself, including the basis upon which delegates to the Convention are allocated.

6. The McGovern Commission has completed its review of state procedures and has issued a report, entitled "Mandate For Reform" (a copy of which is attached hereto as Exhibit A), in which it summarizes the shortcomings it found in those state procedures and recommends guidelines for changing those procedures.

7. As set forth in "Mandate For Reform," the McGovern Commission concluded that certain state procedures were inconsistent with a full, timely and meaningful opportunity to participate in the Party Convention. Among such procedures were the following:

-- Use of the unit rule, a procedure by which a majority of a meeting or delegation can bind a dissenting minority to vote in accordance with the wishes of a majority.

-- Use of favorite son candidates and obligatory instructions for the purpose of binding members of a delegation to vote as a single unit.

-- Inadequate procedures to assure that blacks, young people and women are adequately represented in state delegations.

-- Absence of written Party rules in some states and the inaccessibility of written rules to interested voters in other states.

-- Use of proxy voting, without adequate safeguards against their abuse.

-- Inadequate public notice of Party meetings.

-- Excessive discretion by local Party officials in the choice of dates and times for delegate selection meetings and inadequate provision for uniform statewide procedures.

-- Absence of quorum provisions governing Party committee meetings.

-- Inadequate procedures for the selection of alternate delegates and the filling of delegate vacancies.

-- Procedures requiring selection of delegates at too early a date, before the issues or the candidates have clearly emerged.

-- Imposition of excessive filing fees for candidates for delegate.

-- Inadequacies in the procedures and methods of

allocating delegates within a state.

8. The O'Hara Commission is still in the process of gathering the views of Democrats and others across the country interested in Party reform. As the Commission's publication "Issues and Alternatives" shows, the Commission is considering a broad range of significant matters.

Delegate allocation is the first subject on the O'Hara Commission's list of matters to be reexamined. Other subjects under review by the Commission are described in "Issues and Alternatives" (see pages 15-37) and include:

-- Biennial, rather than quadrennial, Democratic National Conventions.

-- Direct presidential primaries.

-- Use of the unit rule in convention voting.

-- Revision of the parlimentary rules used at the convention.

-- The size, number and function of convention committees.

-- Methods of selection of members for convention committees.

-- Voting procedures within convention committees.

-- Issuance of minority reports by convention committees.

-- Preparation and presentation of Party platform.

-- Procedures for determining prima facie right to be seated as a delegate.

-- Selection of convention site and date.

-- Determination of the agenda for the convention.

No listing of the subjects under consideration by the O'Hara Commission can describe fully the complexity of the matters now under study. That complexity may, perhaps, be made more apparent by noting the types of issues the Commission is considering in connection with the functioning of one of the Convention committees, the Credentials Committee. The principal function of the Credentials Committee is to resolve controversies over seating of delegates at the National Convention. The O'Hara Commission is addressing itself to such credentials questions as the following:

(i) When should the Credentials Committee meet to decide credentials disputes?

(ii) How should the Credentials Committee conduct investigations of credentials disputes?

(iii) If investigations are to be conducted by means of field hearings, how should the Credentials Committee determine whether to institute such hearings?

(iv) If field hearings are used, who should conduct the hearings, how should those persons be selected and how should they conduct the investigations?

9. After the O'Hara Commission has completed its investigation of the important matters it is now studying, it will

present one or more reports to the Democratic National Committee setting forth its findings and recommendations.

10. The Democratic National Committee is responsible for determining delegate allocation procedures for the 1972 Democratic National Convention and for establishing guidelines for the conduct of the Convention itself. The O'Hara Commission's findings and recommendations will be accorded great weight by the members of the Democratic National Committee when the Committee meets to consider the matters now under study.

11. The Democratic Party is committed to reform and to assuring the fullest participation in its affairs by all interested persons. I am confident that important changes toward these ends will result from the work of the McGovern and O'Hara Commissions.

/s/ Lawrence F. O'Brien
Lawrence F. O'Brien

AFFIDAVIT OF HOWARD G. GAMSER

WASHINGTON,)
) ss:
DISTRICT OF COLUMBIA)

HOWARD G. GAMSER, being first duly sworn, deposes as follows:

1. I am Counsel to the Rules Commission. The Rules Commission is an ad hoc, independent Commission created by the Democratic National Committee, in accordance with a resolution unanimously adopted at the 1968 Democratic National Convention, to study and evaluate the procedures for past Democratic National Conventions and to investigate the advisability of changes in those procedures. One of the most significant matters presently under study by the Rules Commission is how delegates to the 1972 Democratic National Convention should be allocated.

2. At present, the National Democratic Party has no delegate allocation procedures in effect for the 1972 Democratic National Convention.

3. As described in greater detail below, the Rules Commission is now in the process of gathering the views of all interested persons on delegate allocation and the other matters under review.

4. When its study is completed, the Rules Commission will prepare one or more reports setting forth its recommendations to the Democratic National Committee, which, after consideration of those recommendations, and prior to the 1972 Democratic National Convention, will determine how delegates to that Convention will be allocated among the nation's Democrats.

5. The Rules Commission was established on February 8, 1969, when Senator Fred R. Harris, then Chairman of the Democratic National Committee, announced the appointment of Representative James G. O'Hara of Michigan as its Chairman and 26 other Democrats as members. Among the 26 members are two Georgia Democrats, Benjamin D. Brown, a Georgia State Representative, and Irving K. Kaler, an Atlanta, Georgia, attorney. (A list of the Rules Commission members appears at page 3 of Exhibit A hereto.)

6. At its May 1969 meeting, the Commission decided that it was essential to obtain the widest range of suggestions with respect to the matters under study and to have the broad participation of interested parties in the Commission's affairs. To achieve these objectives, the Commission concluded that two steps were necessary. One was to provide a convenient forum for

interested persons to present their views to the Commission. It was concluded that the Commission would hold a series of hearings around the country for that purpose. The second was to prepare a document that would set forth the questions under consideration by the Commission so that interested persons would be fully advised of the matters upon which the Commission was soliciting their views.

7. In June 1969, Chairman O'Hara sent letters to hundreds of interested persons, including academicians and elected Democrats, advising them that the Rules Commission was studying the delegate allocation procedures for the Democratic National Convention and other matters and asking for their views as to the specific subsidiary questions that should be addressed.

8. The Commission received numerous suggestions in response to Chairman O'Hara's letter. Those suggestions were incorporated in the study guide, "Issues and Alternatives," issued by the Rules Commission in October 1969. The matter of delegate allocation appears in the study guide as the first "issue" and the matter of delegate allocation is prominently treated in the textual material preceding the statement of the "issues." In the fall of 1969, the Commission distributed more

than 2,500 copies of "Issues and Alternatives" to interested persons around the country. More than 5,000 copies have now been distributed. (Attached as Exhibit A is a copy of "Issues and Alternatives"; see pages 11, 13-14.)

9. Between January 1, 1970, and the date of this Affidavit, the Commission has held regional public hearings in six cities: (1) Minneapolis, Minnesota; (2) Atlanta, Georgia; (3) Oklahoma City, Oklahoma; (4) Salt Lake City, Utah; (5) Boston, Massachusetts; and (6) Detroit, Michigan. These hearings have been well publicized. In advance of each hearing, letters have been mailed to prominent Democrats and others in the region advising them of hearing; copies of "Issues and Alternatives" have been widely distributed; and press releases have been sent to hundreds of news media representatives. Each regional hearing has received wide advance publicity from the news media, and the testimony of persons appearing at these hearings has received broad coverage as well.

10. At least two additional hearings are planned.

11. More than 80 witnesses have submitted statements, oral or written, to the Rules Commission in connection with the first six hearings. Most of these witnesses have addressed them-

selves to the question of delegate allocation. The Commission has also received letters and other written statements dealing with delegate allocation from interested people who have seen copies of "Issues and Alternatives" or who have been otherwise advised that the subject was under review by the Rules Commission.

Needless to say, the Rules Commission has received numerous, and widely divergent, statements of position on the matters under study, especially the matter of delegate allocation. (Exhibit B, attached hereto, contains selected excerpts from statements submitted to the Rules Commission; the excerpts deal with delegate allocation and illustrate the diversity of opinion on the matter.)

12. Typical of the efforts made by the Commission to publicize the public hearings was the work done to publicize the hearing held in Atlanta, Georgia, on February 20, 1970:

In early January 1970, Chairman O'Hara sent personal letters to Governor Maddox of Georgia, the United States Senators and Congressmen from Georgia, the Georgia State Democratic Chairman, and the Georgia Democratic National Committeeman and Committeewoman advising them of the February 20 Atlanta hearing and soliciting their assistance in developing a representative list of witnesses for that hearing. Enclosed with each of the letters was a copy of the Commission's study guide, "Issues and Alternatives."

Letters or memoranda were sent by the Commission to other Georgia residents advising them of the February 20 Atlanta meeting. Copies of the "Issues and Alternatives" publication were enclosed with these letters.

A press release was sent to more than 300 representatives of the news media on January 25, 1970.

The news media widely publicized the fact that the Commission was holding a hearing in Atlanta on February 20, 1970, and was soliciting the views of all interested persons on the matters under study.

Following the hearing, the media gave substantial coverage to the views of witnesses who appeared before the Commission.

Sixteen witnesses appeared before the Commission in Atlanta. Others submitted written statements but did not attend the hearing.

Georgia residents interested in Party reform were well represented at the Atlanta hearing. Nine gave their views to the Commission: (1) Sam Massell, Mayor of Atlanta; (2) Majorie Thurman, Georgia National Committeewoman; (3) William Trotter, Georgia National Committeeman; (4) Joe Sports, Executive Director of the Democratic Party of Georgia; (5) Charles Weltner, former

U. S. Representative from Georgia; (6) Al Kehrer, Chairman of the Georgia Democratic Forum; (7) Charles Morgan of the Atlanta office of the American Civil Liberties Union; (8) the Reverend John Bennett Morris; and (9) Martha W. Gaines, President of the Atlanta Chapter of the National Organization for Women.

13. None of the named plaintiffs in this action appeared at the Atlanta, Georgia, hearing or at any other hearing conducted by the Commission, or has submitted a written statement of his views to the Commission.

14. The Rules Commission welcomes the views of all interested persons, including the named plaintiffs, on any of the issues under study. Written statements may be submitted at any time. Oral testimony may be given at the Commission's final public hearing to be held in Washington, D. C., in September 1970.

15. As noted, after the hearings are completed, the Rules Commission will undertake a thorough study of the statements and testimony submitted to the Commission. Sometime thereafter, the Commission will issue one or more reports commenting on the issues under study by the Commission, including the issue of delegate allocation. These reports will then be reviewed by the Democratic National Committee before further action is taken.

/s/ Howard G. Gamser
Howard G. Gamser

MOTION OF DEFENDANT CARL L. SHIPLEY FOR SUMMARY JUDGMENT AND TO DENY PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT

Comes now defendant Carl L. Shipley in the above entitled action and respectfully moves the Court as follows:

1

For a denial of plaintiffs' motions for a preliminary injunction and summary judgment restraining defendant Carl L. Shipley from nominating candidates for the offices of President or Vice President in malapportioned national conventions and declaring that the national presidential nominating conventions are malapportioned so as to violate plaintiffs' constitutional and civil rights.

2

For summary judgment, pursuant to Rules 56 and 57 of the Federal Rules of Civil Procedure, in favor of defendant Carl L. Shipley declaring that Carl L. Shipley has been improperly named as a defendant, there has been no violation of the Constitution, and that the case does not present a justiciable controversy.

These motions are based on the Statement of Points of Law and Authorities which accompanies the motions.

WHEREFORE, defendant Carl L. Shipley prays that these motions be granted.

M O T I O N

Now come the Defendants Republican National Committee and Mrs. J. Willard Marriott and respectfully move the Court as follows:

1. To dismiss the action against the "National Republican Party" or in lieu thereof to quash the Return of Service of Summons upon the "National Republican Party" on the ground that such service was void in that the Summons and Complaint were not delivered to a proper person in accordance with Rule 4(d)(3) of the Federal Rules of Civil Procedure;

2. To dismiss, pursuant to the provisions of Rule 12(b)(2)(4) and (5) of the Federal Rules of Civil Procedure, the action against the "National Republican Party" because of insufficiency of process, insufficiency of service of process and lack of jurisdiction over the person of the "National Republican Party"; and

3. To strike from the Complaint, pursuant to the provisions of Rule 12(f) of the Federal

Rules of Civil Procedure, all references to the "National Republican Party",

all for the reasons more fully set forth in the Statement of Points and Authorities submitted herewith.

A F F I D A V I T

I, Josephine Good, first being sworn, hereby state as follows:

1. I am now and for some time prior to March 30, 1970 I was an employee of The Republican National Committee stationed at its principal office at 1625 "I" Street, N. W., Washington, D. C.

2. Neither before, on or after March 30, 1970 was I ever an officer, a managing or general agent, an employee of, or authorized by appointment or by law to receive service of process on behalf of, the "National Republican Committee".

3. I make this Affidavit in support of the Motions filed by The Republican National Committee to quash the Return of Service on, dismiss the action in regard to, and strike all references to, the "National Republican Party" in Civil Action No. 882-70 now pending in the United States District Court for the District of Columbia.

DATED: July 31, 1970 /s/ Josephine Good
Josephine Good

A F F I D A V I T

I, Fred C. Scribner, Jr. first being sworn hereby state as follows:

1. I am a member of the firm of Scribner, Hall, Casey, Thornburg & Thompson with offices at 1200 Eighteenth Street, N. W. Suite 1209, Washington, D. C.

2. I am general counsel for The Republican National Committee.

3. The "National Republican Party", a named Defendant in Civil Action No. 882-70 now pending in the United States District Court for the District of Columbia is not a partnership, corporation or unincorporated association. Upon information and belief it is not subject to process and does not in fact exist as an entity sui juris.

4. Miss Josephine Good was never an officer, a managing or general agent, an employee of, or authorized by appointment or by law to receive service of process on behalf of, the "National Republican Committee".

5. I make this Affidavit in support of the Motions filed by The Republican National Committee to quash the Return of Service on, dismiss the action in regard to, and strike all references to, the "National Republican Party" in Civil Action No. 882-70 now pending in the United States District Court for the District of Columbia.

DATED: July 31, 1970

/s/ Fred C. Scribner Jr.
Fred C. Scribner, Jr.

MEMORANDUM AND ORDER

Plaintiffs in this action are seeking injunctive relief and a declaration by this Court that the Fourteenth Amendment requires that delegates to the national conventions of the Republican and Democratic political parties be allocated among the various states strictly on the basis of population.

A political party is in its essence based upon the constitutional rights of citizens embraced in the freedoms of assembly, speech and press which assure that citizens be free to organize themselves to engage in political discussion and activity. See, 29 C.J.S. Elections §84, Political Parties. While it is recognized that, when necessary to prevent unreasonable abuses, courts are competent to evolve new doctrines in the realm of the "internal affairs" of voluntary associations, it appears that the procedures adopted by the defendant political parties and attacked herein are responsive and reasonable under the prevailing circumstances. The allocation formulae adopted by the Republican and Democratic national conventions are employed to further their legitimate purposes and are neither arbitrary, capricious nor violative of any right guaranteed under the Fourteenth Amendment.

In Powell v. McCormack, 295 U.S. 486 (1969), the Court stated that justiciability encompasses two important considerations: first, the courts must determine whether the issue

constitutes a political question and second, the courts must find that the claim presented and the relief sought admit of judicial relief. This Court finds that the claim in this action does not admit to judicial relief as there are no "judicially discoverable and manageable standards" by which to frame appropriate relief. Maxey et al v. Washington State Democratic Committee et al, (No. 7838, D.C.W.D.Wash., October 26, 1970), cited by plaintiffs, turned, in material respects, on a statutory commitment of the State of Washington to the popular election of delegates to the national conventions. No such state statute is involved in the present case.

Accordingly, it is by the Court this 24th day of November 1970

ORDERED that plaintiffs' motion for preliminary injunction and summary judgment be and it is hereby denied, and it is further

ORDERED that defendant Carl L. Shipley's motion for summary judgment is treated as a motion to dismiss and it is hereby granted, and it is further

ORDERED that the motion of defendants National Democratic Party, National Democratic Committee, Channing E. Phillips and Miss Flaxie Pickett to dismiss be and it is hereby granted, and it is further

ORDERED that the motion of defendants Republican National Committee and Mrs. J. Willard Marriott to dismiss be and it is

hereby granted, and it is further

ORDERED that the motion of defendant National Republican Party to quash service of process be and it is hereby granted.

/s/ John Lewis Smith, Jr.
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for the appellants in the above styled case and that I have this day served the foregoing Appendix upon the defendants by mailing two true copies thereof to each of their attorneys of record, at their known addresses, postage prepaid, as follows:

Alexander E. Bennett, Esquire, Arnold & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. 20036;

Fred C. Scribner, Jr., Esquire, Pierce, Atwood, Scribner, Allen & McKusick, 465 Congress Street, Portland, Maine 04111;

Shipley, Akerman, Pickett, Stein & Kaps, 1108 National Press Building, Washington, D. C. 20004.

This _____ day of _____, 1971.

_____

HAROLD N. HILL, JR.

Of Counsel for Appellants

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1018

THE STATE OF GEORGIA, et al.,

Appellants,

—VS—

THE NATIONAL DEMOCRATIC PARTY, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANTS

ARTHUR K. BOLTON
Attorney General

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Executive Assistant
Attorney General

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132 State Judicial Building
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IN THE

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-VS-

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et al.,

Appellees.

On Appeal from the United States District
Court for the District of Columbia

BRIEF FOR APPELLANTS

ISSUES PRESENTED FOR REVIEW

1. May the defendant national political parties weight the votes of citizens in favored states, and dilute the votes of citizens in disfavored states, in nominating the President of the United States?

2. May the two political parties nominate the President and Vice-President in malapportioned national conventions, or should such conventions be reapportioned pursuant to the 14th Amendment on the basis of one man -- one vote?

3. Was the court below correct in holding that "one man -- one vote" is not a judicially discoverable and manageable standard when applied to defendants?

4. Did the court below err in granting defendants' motions to dismiss and in denying plaintiffs' prayers for injunctive relief and for declaratory judgment?

5. Did the court below err in granting "the motion of defendant National Republican Party to quash service of process" when the defendant National Republican Party made no such motion, it having been belatedly made by co-defendants who had previously answered the Complaint?

This case has not previously been before this Court.

REFERENCES TO RULINGS

The "Memorandum and Order" of the District Court, issued November 24, 1970, granting defendants' motions to dismiss and denying plaintiffs' motions for preliminary injunction and for summary declaratory judgment, is set forth in the Appendix at pp. 62 - 64.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Plaintiffs filed their Complaint (App. 7 - 30) on March 25, 1970, alleging that the votes of citizens of Georgia are diluted and debased by the formulas by which the defendants apportion votes among the states at their national presidential nominating conventions.

Plaintiffs prayed (a) for declaratory judgment that the defendants' national conventions are malapportioned, (b) for declaratory judgment that such malapportionment violates plaintiffs' constitutional and civil rights, and (c) for injunctive relief to prevent the nomination of the President and Vice-President in malapportioned conventions (App. 26 - 27).

The principal defendants sought and obtained extensions of time, until July 15, 1970, in which to respond to the Complaint (App. 4 - 5). Utilizing the interim for discovery (App. 3), the plaintiffs, on June 18, 1970, moved for preliminary injunction and for summary judgment on their prayers

for declaratory judgment (App. 34).

Defendant Carl L. Shipley, District of Columbia member of the Republican National Committee, had answered on June 3, 1970. The Democratic defendants (National Democratic Party, Democratic National Committee, and Channing E. Phillips and Miss Flaxie Pinkett, the District of Columbia members of the Democratic National Committee) filed their motion to dismiss on July 15, 1970 (App. 42). Defendants the Republican National Committee and Mrs. J. Willard Marriott (the other District of Columbia member of the Republican National Committee) moved to dismiss also on July 15, 1970 (App. 40).

The remaining defendant, the National Republican Party, filed no response to the Complaint, although it had entered an appearance [D. C. Rule 4(a)] on May 13, 1970, seeking an extension of time in which to respond to the Complaint (App. 33). On August 3, 1970, after the time for answering the Complaint had expired, and after they had responded to the Complaint, defendants the Republican National Committee and Mrs. Marriott moved to quash the service of process on the National Republican Party (App. 58).

Hearing of the pending motions was held on November 6, 1970, and the court's "Memorandum and Order" (App. 62) was

issued on November 24, granting defendants' motions to dismiss, granting also "the motion of defendant National Republican Party to quash service of process" (App. 64), and denying plaintiffs' motions for preliminary injunction and for summary judgment as to the declaratory relief sought.

STATEMENT OF RELEVANT FACTS

The Complaint in this action (App. 7 - 30) alleges federal jurisdiction and the following facts, among others:

The individual plaintiffs are registered and qualified voters of the State of Georgia and this action was instituted on their behalf as voters.

The defendants are the National Democratic Party, the Democratic National Committee, the two District of Columbia members of the Democratic National Committee, the National Republican Party, the Republican National Committee, and the two District of Columbia members of the Republican National Committee. (The named defendants are sued as class representatives, to wit: as representatives of their respective National Committees and the members thereof, and as representatives of the political parties to which they belong and the members thereof.)

Every four (4) years since 1788, a President and Vice

President have been elected. The last such election occurred in 1968 and the next will occur in 1972.

There exists in this nation today [with respect to presidential elections] a two political party system, which system has existed since at least 1868. The two political parties are the defendant National Democratic Party and the defendant National Republican Party.

Every four years the defendant political parties meet in convention to elect nominees for the offices of President and Vice President.

The political party system of nominating conventions to choose candidates for the Presidency began in 1832 in the Democratic Party. The Republican Party met in its first national convention in 1856.

No person not a nominee of one or the other of the two defendant political parties has been elected President or Vice President in the last 100 years.

Nomination of the candidates of one's choice at one of defendants' national conventions as nominee for the office of President or Vice President is the only means available to succeed in electing such candidates to such offices.

Failure to become the nominee for the office of President or Vice President of one or the other of the two defendant political parties is equivalent to defeat.

Voters in the United States, including voters in plaintiff State, are effectively limited in their choice of President and Vice President to the nominees of one or the other of the defendant political parties.

The nominees of the two defendant political parties are chosen in malapportioned National Conventions. [The apportionment formulas of both political parties for their 1968 Conventions are set forth in the Complaint (App. 9 - 12). Suffice it to say here that both political parties award "victory bonus" votes to States which favored the party's presidential candidate and award "popular bonus" votes based on the number of votes cast for the party's candidate in the last presidential election.]

Paragraphs 36 through 52 of the Complaint (App. 13 - 25) describe the State laws ("state action") governing the presidential election process, commencing with the selection of delegates to the defendants' National Conventions, and concluding with the statutory instructions governing each State's Presidential Electors.

The Complaint alleges, and shows, that the National Conventions are an integral part of the presidential election process. (App. 12 - 25).

The Complaint then alleges that plaintiffs are being denied equal protection of the law and the right to vote on a one person -- one vote basis by virtue of defendants' malapportioned National Conventions, alleges that plaintiffs have no adequate remedy at law, and prays for declaratory judgment and injunctive relief (App. 26 - 27).

Plaintiffs' motions for preliminary injunction and for summary judgment were patterned upon the allegations of the Complaint (R. 44, Plaintiffs' Statement of Material Facts, pp. 1 - 10). In addition, the following details as to the malapportioned National Conventions were brought out (App.38; R. 44, Statement of Points of Law and Authorities in Support of Plaintiffs' Motions for Preliminary Injunction and for Summary Judgment, pp. 3, 22-23).

Twenty-eight states were overrepresented at both 1968 National Conventions (Alaska, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota,

Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming). The ratio of most overrepresented to least represented was in excess of 9 to 1 in both conventions. (App. 39).

The people in the State of Alaska were overrepresented in both national conventions held in 1968 by a variance of approximately 85% (Demo. - 84.97%; Repub. - 85.99%). Delegates representing about 38% of the people have a majority and can nominate the candidates in both conventions (Demo. - 38.27%; Repub. - 37.39%). (App.39).

Of the 28 States which were overrepresented at the 1968 National Conventions, 19 were west of the Mississippi River. Of the 14 States which were underrepresented at both National Conventions in 1968, 12 were east of the Mississippi (App.38).

The defendants' apportionment formulas which produced this disproportionate "State-unit" system favoring the western states were found by the court below to be "responsive and reasonable under the prevailing circumstances" (App.62).

ARGUMENT

Introduction

Fifty years ago, Mr. Justice Pitney, concurring in Newberry v. United States, 256 U. S. 275 at 285-286 (1921), said:

> ". . . [E]very voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nomination. . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."

William Marcy Tweed is quoted by James W. Davis, PRESIDENTIAL PRIMARIES; ROAD TO THE WHITE HOUSE (New York: Thomas Y. Crowell Company, 1967), p. 15, as saying:

> "I don't care who does the electing just so I can do the nominating."

Who does the nominating? At the 1964 Democratic National Convention, 54.6% of the delegates were "party officials".1/

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1. THE DEMOCRATIC CHOICE, A REPORT OF THE COMMISSION ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, Hon. Harold Hughes, Chairman, pp. 68, 1969.

In other words, politicians do the nominating.

Public opinion polls taken in 1952, 1956, 1964 and 1968 show that from 58% to 76% of the people in this country favor a nationwide presidential primary instead of political party conventions.[1]

Congress has been considering legislation to create a national presidential primary. If not enacted, the public's dissatisfaction with national conventions will continue. If enacted, the political parties undoubtedly would hold their national conventions before the primary, and the ultimate choice of the mass of voters would continue to be predetermined by the politicians making the nominations.

> "A Constitutional amendment is needed to establish any Presidential primary system which would prevent nomination by the

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1. Tacheron and Spier, A NATIONAL PRESIDENTIAL PRIMARY?, Library of Congress, Legislative Reference Service, p. 84, 1968.

convention system. . . ."[1]

". . . [W]e should reform our conventions rather than abolish them. . . ."[2]

With or without enactment of a national primary law, reform of nominating conventions is long overdue.

Both parties are revising, or at least studying, delegate selection methods, looking toward increased voter participation in the selection of delegates.[3]

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1. Senator Douglas in hearings before a Subcommittee on Rules of the Committee on Rules and Administration of the United States Senate; Preference Primaries for Nomination of Candidates for President and Vice President, March 28, 1952 (Washington: U. S. Government Printing Office, 1952), pp. 14-15.

2. Congressman John S. Monagan, Congressional Record, Vol. CXIV, No. 158 (Sept. 26, 1968), p. H9247.

3. Minimum standards for the Delegate Selection Process, adopted by the 1968 Democratic National Convention, THE DEMOCRATIC CHOICE, supra, pp. 87-91. Report of the Committee on Rules and Order of Business, adopted by the 1968 Republican National Convention, Rules 29 and 32.

However, neither party has adopted rules reapportioning their badly malapportioned National Conventions.

There is little need to have a national presidential primary or to increase voter participation in delegate selection, so long as the conventions themselves are illegally constituted so as to give voters in one state nine times the nominating power of less favored states.

Political parties, like legislatures, are not about to initiate reapportionment voluntarily. Apportionment of nominating conventions will come only as a result of court action.

The Court Below Misconstrued The Only Supreme Court Decision It Cited

The court below cited only one Supreme Court decision, Powell v. McCormack, 395 U.S. 486 (1969). It misconstrued that decision.

Powell v. McCormack involved Congress' denial to Adam Clayton Powell of his seat in the House.

Regarding Powell, the court below said (App. 62 - 63):

"In Powell v. McCormack, 295 U.S. 486 (1969) the Court stated that justiciability encompasses two important considerations: first, the courts must determine whether the issue constitutes a political question and second, the courts must find that the claim presented and the relief sought admit of judicial relief. This Court finds that the claim in this action does not admit to judicial relief as there are no 'judicially discoverable and manageable standards' by which to frame appropriate relief."[1]/

See Powell v. McCormack, 395 U.S. at 516-517.

However, the Powell decision went on to hold that where declaratory judgment is sought (as it is in the instant case), it should be granted even if coercive (injunctive) relief were found to be inappropriate. The Court in Powell said (395 U.S.

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1. By its use of Powell, the court below did two things: (1) It concluded that it had jurisdiction over the subject matter, 395 U.S. at 516, and (2) It decided not to dismiss on the basis of there being a "political question" involved here, 395 U.S. at 517.

at 517):

> "We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued."

As in Powell, the petitioners here sought a declaratory judgment, a form of relief the District Court could and should have issued.

Moreover, in Powell the Court relied upon the first of its reapportionment decisions, Baker v. Carr, 369 U.S. 186 (1962), saying (Powell v. McCormack, supra, 395 U.S. at 517):

> "In deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.' Baker v. Carr, supra, at 198." (Underscoring added.)

As for the case at bar, based upon the Supreme Court's reapportionment decisions in Baker v. Carr and others, the duty asserted has been judicially identified -- one man -- one vote. The breach has been judicially determined -- malapportionment

violates the equal protection clause. And the remedy has been judicially molded -- reapportionment on the basis of one man -- one vote.

In Baker, the Court held that reapportionment cases are justiciable. The Court said (369 U.S. at 226):

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."

We submit that the court below erred not only in denying declaratory relief (Powell v. McCormack, supra), but also in denying injunctive relief (Baker v. Carr, supra, and other reapportionment decisions).

The Court Below Erred In Approving Defendants' Apportionment Formulas

The court below said (App. 62):

> "The allocation formulae adopted by the Republican and Democratic national conventions are employed to further their legitimate purposes and are neither arbitrary, capricious nor violative of any right guaranteed under the Fourteenth Amendment."

The court did not say what the defendants' "legitimate purposes" are.

The court below said that defendants' apportionment formulas are (App. 62) ". . . responsive and reasonable under the prevailing circumstances". The court did not say what the "prevailing circumstances" are.

The decision of the court below is erroneous by reason of its failure to articulate acceptable reasons for the variations among the populations of the States. We recognize that it may sound strange for us to say that a decision is erroneous because it fails to state reasons. That is, however, the law of reapportionment. Swann v. Adams, 385 U.S. 444 (1969).

In Swann, the Court said (385 U.S. at 443-444):

> "We reverse for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the senate and house of representatives. * * * De minimis deviations are unavoidable but variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimis and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."

In the case at bar the variations between States range between 85% overrepresentation in both Conventions (Alaska was overrepresented by 85.99% in the 1968 Republican Convention and by 84.97% in the Democratic Convention), to 49.27% underrepresentation (Alabama) in the Democratic Convention and 35.85% (California) in the Republican Convention (App. 39). Thus, the variations in the instant case far exceed those held invalid in Swann v. Adams, supra.

The Court in Swann found that reversal was mandatory (385 U.S. at 505):

> "As this case comes to us we have no alternative but to reverse. The District Court made no attempt to explain or justify the many variations among the legislative districts."

Here too, we submit, reversal is mandatory, not only because of the failure to justify the variations, but also because such variations could not be justified in any event.

It will be recalled that at both 1968 Conventions, the delegates from Alaska had nine times the voting power of the least represented States (App.39).

In Wesberry v. Sanders, 376 U.S. 1 (1964), the father of Congressional reapportionment cases, the Court said (376 U.S. at 8:

> "It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighed at two or three times the value of the votes of people

> living in more populous parts of the State, for example, the Fifth District around Atlanta."

It is extraordinary that in nationwide elections the votes of inhabitants of some parts of the nation, for example, thinly populated Alaska, are weighed at nine times the value of the votes of people living in more populous States.

In Reynolds v. Sims, 377 U.S. 533 (1964), the Court said (377 U.S. at 562):

> "And, if a State could provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted

only at face value, could be constitutionally sustainable."

When the political parties provide that the votes of citizens in one part of the nation should be given two times, or five times, or ten times the weight of votes of citizens in another part of the nation, it can hardly be contended that the right to vote of those residing in the disfavored States has not been effectively diluted. And it is inconceivable that a rule of a political party to the effect that, in nominating the President, the votes of citizens in one part of the nation would be multiplied by two, five or ten, while the votes of persons in another State would be counted only at face value, can be constitutionally sustainable.

The Court in Reynolds v. Sims, supra, continued, saying (377 U.S. at 567):

"To that extent that a citizens's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting . . . . Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative govern-

> ment remains, and must remain, unchanged--the weight of a citizen's vote cannot be made to depend on where he lives."

By the same token, the fact that plaintiffs live here or there is not a legitimate reason for underweighting their votes. The basic principle of representative government remains, and must remain, unchanged - the weight of a citizen's vote cannot be made to depend on where he lives.

The court below erred in approving, without any justification whatsoever, the gross malapportionment formulas of the defendants.

The Court Below Erred In Not Following The *Maxey* Decision

By its per curiam opinion in *Dahl v. Republican State Committee*, 393 U.S. 408 (1969), in which it preserved plaintiffs' right to seek a properly apportioned state political convention, the Supreme Court set the stage for *Maxey*, *infra* ("Selection of Delegates to Conventions", 78 Yale L.J. 1224, 1244, n. 61, 1969).

Maxey v. Washington State Democratic Committee (No. 7838, D.C.W.D. Wash, Oct. 26, 1970), was a companion to *Dahl*. In *Maxey*, the District Court held that a state convention of a political party at which delegates to the National Convention

are elected, must be reapportioned. A copy of the Maxey decision appears at R. 60 in the Record of this case.

The Court below referred to Maxey as follows (App.63):

> "Maxey et al v. Washington State Democratic Committee et al, (No. 7838, D.C.W.D. Wash., October 26, 1970), cited by plaintiffs, turned, in material respects, on a statutory commitment of the State of Washington to the popular election of delegates to the national conventions. No such state statute is involved in the present case."

In fact, there was no statutory commitment in the State of Washington to the popular election of delegates to the national conventions. Washington's delegates were elected in state conventions. On the other hand, there is a statutory commitment by every State in the Union to the popular election of presidential electors (App. 24, par. 47).

There is, as alleged in the Complaint (App. 19 - 20, pars. 36 and 37), also a statutory commitment to the popular election of delegates to the national conventions in 14 States and the District of Columbia,[1/] but not in Washington State.

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1. R. 44; NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, pp. 60-63, cols. 2 and 3.

The court below misunderstood Maxey, and this case.

The methods by which delegates to National Conventions are chosen are set forth in the Complaint in this action (App. 19 - 23) and are supported by the Record (R. 44; NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, INCLUDING THE MANNER OF SELECTING DELEGATES TO NATIONAL POLITICAL CONVENTIONS (January, 1968), compiled by Richard D. Hupman, Senate Library, and Robert L. Tienken, Legislative Reference Service, Library of Congress, under the direction of Francis R. Valeo, Secretary of the Senate).

Basically, there are three methods currently in use for electing national convention delegates, as follows:

1. Election of all delegates in primaries (California, District of Columbia, Florida, Massachusetts, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, South Dakota, West Virginia and Wisconsin - 11 states and the District of Columbia).

2(a) Election of all delegates in state conventions (Alaska, Colorado, Delaware, Hawaii, Idaho, Iowa, Maryland, Mississippi, Montana, Nevada, New Mexico, North Dakota, South

Carolina, Texas, Utah, Vermont, and Wyoming - 17 states).

2(b) Election of delegates at large in state conventions and election of district delegates in district conventions (Kansas, Kentucky, Michigan, Missouri, Oklahoma and Tennessee - 6 states).[1]

3. Election of delegates by state committees (Arizona, Arkansas, Louisiana and Rhode Island - 4 states).

Three (3) states use a combination of these methods. New York elects district delegates in a primary (1 above), whereas delegates at large are elected by the state convention or the state committee (method 2 or 3 above). In Pennsylvania, district delegates are elected in a primary (1 above) and delegates at large are elected by the state committee (3 above). Illinois elects district delegates in the primary (1 above) and delegates at large in state convention (2 above).

The remaining states (9) allow the parties to choose the method. In Alabama, the Democrats use method 1 above and the Republicans use method 2(b). In Connecticut, Indiana, Maine, Minnesota, North Carolina, Virginia and Washington, the Demo-

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1. Legally, there can be no difference between a state convention and a district convention.

crats use method 2(a) and the Republicans use method 2(b). In Georgia, Republicans use method 2(b) and the Democrats are appointed by the party chairman.

In some convention states (method 2 above), the delegates to the state convention are elected in primaries. In others, the delegates to state conventions are elected by county conventions, the delegates to the county conventions having been elected in primaries.

Primaries (method 1 above) constitute state action, United States v. Classic, 313 U.S. 299 (1941).

The action of state conventions (method 2 above) constitutes state action, Smith v. Allwright, 321 U.S. 649 (1944).

The action of state committees (method 3 above) constitutes state action, Nixon v. Condon, 286 U.S. 73 (1932).

The action of political parties mandated by state law, Nixon v. Herndon, 273 U.S. 536 (1927), or simply regulated by state law, Smith v. Allwright, supra, constitutes state action. Even unregulated party action constitutes state action, Terry v. Adams, 345 U.S. 461 (1953).

The method of selecting delegates to national conventions

is controlled by, or is subject to the control of, state law in every state.

In view of United States v. Classic, Smith v. Allwright, Nixon v. Condon, Nixon v. Herndon, and Terry v. Adams, supra, plus Evans v. Newton, 382 U.S. 296, 299 (1966), Moore v. Ogilvie, 394 U.S. 814, 818 (1969), and Powell v. McCormack, supra, 395 U.S. at 547, the court below erred in not following the Maxey decision and in not requiring the defendants to apportion their Conventions on the basis of one man -- one vote.

The Court Below Erred In Sustaining the Non-Existent "Motion of Defendant National Republican Party To Quash Service of Process"

This suit was filed on March 25, 1970, and was served on the National Republican Party (defendant No. 5) and the Republican National Committee (defendant No. 6) on March 30, 1970, according to the Return on Service of Writ by Deputy Marshall J. B. Colasanti. (App. 31, 32; R. 65, Tr. p. 78.)

On May 13, 1970, a stipulation extending to May 25, 1970, the time in which the defendants, The National Republican Party, The Republican National Committee, Carl L. Shipley and Mrs. J. Willard Marriott, may answer, move, or otherwise plead to the

Complaint, was filed by their counsel (App. 33; R. 65, Tr. p. 79). Thus, the National Republican Party entered its appearance in this case [D.C. Rule 4(a)].

Mr. Shipley, through his attorney, Mr. Moreland G. Smith, filed his answer on May 25, 1970. On July 6, a final extension, to July 15, was granted to the Republican National Committee and Mrs. Marriott for responding to the Complaint (App. 4).

The Republican National Committee and Mrs. Marriott filed their answer on said July 15, 1970. In their answer they did not undertake to raise any defense on behalf of the National Republican Party (R. 49).

The National Republican Party has not yet answered or responded to the Complaint, although its response was due not later than May 25, 1970. The Party has made no motion to quash service of process.

By motion dated July 31, 1970, filed August 3, 1970, the Republican National Committee and Mrs. Marriott moved the Court to dismiss the action against the National Republican Party or to quash the Return of Service as to the Party (App.58).

With respect to that motion, the plaintiffs' positions are as follows:

1. Defendants Republican National Committee and Mrs. Marriott have no standing to raise personal defenses of another defendant.

2. Defendants Republican National Committee and Mrs. Marriott, having answered on July 15, 1970, waived by the express provisions of Rule 12(h) and 12(g), F.R.C.P., the defenses of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process, as to the National Republican Party, even if they had standing to raise such defenses.[1/]

3. Even if timely made by a proper party, the motion to dismiss or quash should have been overruled.

Before considering the fallicies of that motion, let us consider the status of the National Republican Party. The National Republican Party is an "unincorporated association" subject to suit by virtue of Rule 17(b), F.R.C.P.

Rule 17(b), entitled "CAPACITY TO SUE OR BE SUED", provides for individuals and corporations, and then provides in pertinent part as follows:

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1. The court below avoided points 1 and 2 above, and at the same time erred, by ruling on a non-existent motion by the Republican Party.

> "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States . . . ." (Underscoring added.)

An unincorporated association has been defined, for the purpose of Rule 17(b), in Yonce v. Miners Memorial Hospital Ass'n, 161 F.Supp. 178, 186 (W.D.Va. 1958), as:

> ". . . a voluntary group of persons joined together by mutual consent for the purpose of promoting some stated objective. Such an association suggests an organized group made up of persons who become members of an association voluntarily, but subject to certain rules or by-laws; the members are customarily subject to discipline for violations or non-compliance with the rules of the association."

The court below recognized that political parties are "voluntary associations" (App.62).

As evidence that the National Republican Party is an unincorporated association, plaintiffs offered the following:

1. As for rules and by-laws, we offered the admissions of the Republican National Committee to Plaintiffs' Request for Admission (R. 38) No. 8 admitting the genuineness of the copy of their rules set out as Exhibit A to those Requests (R. 65, Tr. 83).

2. As for the "voluntary group of persons" we offered:

   (a) Membership application envelope from the October, 1970 issue of The Republican, soliciting membership in the Party (R. 65, Tr. 84; R. 64, Plaintiffs' Exhibit 1);

   (b) 1969 Membership card showing membership in the Party and showing that its headquarters is in Washington, D. C. (R. 65, Tr. 84; R. 64, Plaintiffs' Exhibit 2);

   (c) 1970 Membership card (Tr. 85);

3. As for promoting the objective of the association, we offered the reverse side of the 1970 Membership Card (R. 65, Tr. 85), and we offered a letter setting

forth the Republican program and showing that Party headquarters was located at 1625 Eye Street (R. 65, Tr. 85-86; R. 64, Plaintiffs' Exhibit 3);

4. We also offered (R. 65, Tr. 86) the admission by defendant Carl L. Shipley, a member of the Republican National Committee and National Republican Party, contained on page 4 of his Statement of Points of Law and Authorities in Support of his Motions for Summary Judgment and to Deny Plaintiffs' Motions for Preliminary Injunction and Summary Judgment, filed on July 15, 1970 (R. 52), reading as follows:

> "The national political parties which are defendants in this case are unincorporated associations."

And we offered (R. 65, Tr. 86) Mr. Shipley's admission at the bottom of page 6 of that same Statement of Points (R. 52) reading as follows:

> "The only alleged unconstitutional acts are those of unincorporated associations."

We are not unaware that the Republican National Committee declined to admit, in response to our Request for Admission (R. 38) No. 18, that the National Republican Party is an un-

incorporated association composed of voters favoring Republican candidates for public office. We submit that the evidence is to the contrary. Moreover, when we asked the Republican National Committee, in our interrogatory 18(e), to state what the Party is, the Committee answered (R. 36):

"It is a National Political Party."

The Courts have held that political parties are "unincorporated associations." State v. Millspaugh, 175 N.E.2d 13, 15 (Ind. 1961); Robinson v. Holman, 26 S.W.2d 66, 68 (Ark. 1930), Application of Burns, 108 N.Y.S.2d 62, 64 (Sup.Ct.), rev'd on other grounds, 109 N.Y.S. 2d 683 (App.Div.), rev'd 102 N.E.2d 569 (Ct.App. 1951); Battipaglia v. Executive Committee, Etc., 20 Misc. 2d 226, 191 N.Y.S. 2d 288, 293 (Sup.Ct. 1959); Democratic Organization v. Democratic Organization, Inc., 1 N.Y.S.2d 349, 350-51 (Sup.Ct., App. Div. 1938).

In State v. Millspaugh, supra, 175 N.E.2d at 15, the Court said:

> "Political parties are unincorporated associations composed of persons who voluntarily act together for certain political purposes."

We, therefore submit that under the law and evidence in this case, the Republican Party is an unincorporated association and is subject to suit in this action under Rule 17(b).

We turn now to consider the motion to quash by the Republican National Committee and Mrs. Marriott. They contended that service was not perfected on a proper person under Rule 4(d)(3), F.R.C.P.

The returns of deputy marshall J. B. Colasanti show that he served the National Republican Party and the Republican National Committee on March 30, 1970, by delivering summons and complaint to one Miss Jo Goode at 1625 "I" Street, N. W., Washington, D. C. (App. 31, 32). Service upon Miss Jo Goode as to the Republican National Committee has been accepted and is not contested. Thus, she legally was a proper person to serve insofar as the Republican National Committee was concerned.

Rule 4(d), F.R.C.P., provides that service is made:

> "Upon . . . a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process. . . ." (Underscoring added.)

The Republican National Committee is the "general manager" of the Republican Party. Rule 19(a) of their rules (exhibit A to plaintiffs' requests for admissions, admitted by the Committee's answer (R. 38) No. 8; see also R. 65, Tr. 88-89) provides that the Committee:

> ". . . shall have the general management of the affairs of the Republican Party in the United States and its territories subject to direction from time to time of the National Convention." (Underscoring added.)

Service upon Miss Good was effective as to the Committee, and service upon the Committee was effective as to the Party.

In fact, the affidavits filed with the motion to quash do not deny that Mrs. Good herself was authorized to receive service of process on behalf of the Party (Tr. 79-80, R. 65). They say only that she was not authorized to receive it on behalf of the "National Republican Committee" (App.60 ,61). Thus, those affidavits do not controvert the Marshall's Return of Service.

As further proof of the agency of the Republican National

Committee, we offered (R. 65, Tr. 89) the Committee's answer (R. 36) to plaintiffs' interrogatory 18(i), in which the Committee admitted that it "probably" has cashed checks made payable to the Party, and we offered a check made payable to the Party which the Committee did deposit to its credit (R. 65 Tr. 89-90; R. 64, Plaintiffs' Exhibit 4).

We submit that since the Committee has authority to accept, and deposit to its own account, checks made payable to the Party, it has authority to accept and receive service of a lawsuit against the Party.

Thus, we submit, the motion to quash was without merit under Rules 17(b) and 4(d)(3), F.R.C.P. In any event, the movants, the Republican National Committee and Mrs. Marriott, had no standing to raise personal defenses of another defendant, and they waived those defenses by their untimely filing of the motion [Rules 12(h) and 12(g)]. Moreover, the Marshall's Return of Service stands uncontroverted.

In summary, it should be noted that the Republican defendants do not contend that no service was made on the Party. They contend that such service as was made was deficient, yet they have shown no prejudice to the Party or to themselves.

The purpose of service is notice, and the Republican Party has had notice.

The court below erred when it granted a non-existent motion by the Republican Party to quash service upon an unincorporated association, which service stands uncontroverted in this record.

CONCLUSION

The courts have required reapportionment of municipal governments, of county governments, of state legislatures (both houses), and of congressional districts. The court below declined to grant relief as to the grossest malapportionment existing today.

The courts have applied the "one man -- one vote" rule in primaries[1/] because they are an integral part of the election process. The court below declined to apply that rule in those conventions which are an integral part of the presidential election process.

If apportionment on the basis of one man -- one vote is to be required of the 50 States, it should be required of these defendants, who control the highest office in all the United States.

The court below erred in granting the defendants' motions to dismiss, in granting a non-existent motion to quash, and in

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1. Gray v. Sanders, 372 U.S. 368 (1963).

denying plaintiffs' motions for preliminary injunction and for summary declaratory judgment. The judgment of the court below should be reversed, as to each ruling made, with direction to grant plaintiffs' motions, and the defendants should be enjoined from nominating the President and Vice President in conventions conducted on a basis other than one man -- one vote.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for the appellants in the above styled case and that I have this day served the foregoing Brief for Appellants upon the defendants by mailing two true copies thereof to each of their attorneys of record, at their known addresses, postage prepaid, as follows:

Alexander E. Bennett, Esquire, Arnold & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. 20036;

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Shipley, Akerman, Pickett, Stein & Kaps, 1108 National Press Building, Washington, D. C. 20004.

This _____ day of _____, 1971.

_____

HAROLD N. HILL, JR.

Of Counsel for Appellants

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1018

THE STATE OF GEORGIA, *et al.*,
Appellants,

v.

THE NATIONAL DEMOCRATIC PARTY, *et al.*,
Appellees.

On Appeal From an Order and Judgment of
The United States District Court
for The District of Columbia

BRIEF FOR APPELLEES THE NATIONAL DEMOCRATIC PARTY, THE DEMOCRATIC NATIONAL COMMITTEE, FLAXIE M. PINKETT AND CHANNING E. PHILLIPS

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The Democratic National Committee
Flaxie M. Pinkett
Channing E. Phillips

Dated: March 4, 1971

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ISSUES PRESENTED FOR REVIEW

This is an appeal from a dismissal of a complaint seeking the establishment of a constitutional rule dictating that national political parties allocate delegates to their national conventions among the states strictly on the basis of population. At a meeting of the Democratic National Committee on February 19, 1971, a formula for the allocation of delegates to the 1972 Democratic National Convention was adopted, which allocates delegates among the states and the District of Columbia on the basis of a combination of (a) Electoral College strength and (b) relative Democratic

strength, as measured by the average number of votes for the Democratic candidates for President and Vice President in the past three Presidential elections. The text of such formula is reproduced in Addendum I hereto, pp. A-1 - A-4, *infra*, and its principal terms are described at pp. 7 - 9, *infra*.

It is the opinion of appellees The National Democratic Party, The Democratic National Committee, Flaxie M. Pinkett and Channing E. Phillips that, so far as pertinent to them, the issues on this appeal are the following:

1. Whether the district court correctly concluded that there are no "judicially discoverable and manageable standards" by which a federal court may establish a single constitutional rule governing the allocation among the states of delegates to national party conventions and that the subject of the complaint was therefore not justiciable.

2. Whether the formula of the Democratic Party allocating delegates to the 1972 Democratic National Convention among the states on the basis of Electoral College strength and of Democratic strength is consistent with the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

[This case has not previously been before the Court.]

REFERENCE TO RULING

The memorandum and order of the district court (App. 62-64), entered on November 24, 1970, is not yet reported.

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are pertinent to this appeal:

"Article II

"Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office

during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

* * *

"Amendment XII

"The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President."

* * *

"Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Nature Of the Case.

Appellants, the State of Georgia, Lester G. Maddox and others,[1] seek a constitutional ruling dictating that delegates to conventions of national political parties be allocated among the states strictly on the basis of population, with no weight given to other considerations, such as relative Democratic strength within the states or the provisions of the United States Constitution relating to the role of the Electoral College in the election of the President.

This is not a case involving votes for election to public office. Nor is it a case involving any asserted denial of the rights of any minority group. The issue relates solely to the allocation of delegate strength among the states for conventions of national political parties.

B. Proceedings In the Court Below.

Following the filing of a complaint in the United States District Court for the District of Columbia, plaintiffs moved for summary judgment (and for a preliminary injunction) against defendants, who represent the National Democratic Party and the National Republican Party.[2] The request for relief sought judgment "declaring that the national presidential

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[1] The plaintiffs in the action in the court below, appellants in this Court, were the State of Georgia, Lester G. Maddox, individually and, at the time the suit was brought, as Governor of the State of Georgia, the State Election Board of Georgia, and various individuals, including members of the State Election Board of Georgia.

[2] The named defendants related to the Democratic Party were The National Democratic Party, The Democratic National Committee, Flaxie M. Pinkett and Channing E. Phillips, the Democratic national committeewoman and committeeman for the District of Columbia.

nominating conventions of the National Democratic and Republican Parties are malapportioned, and that such malapportionment violates plaintiffs' constitutional and civil rights." (App. 34).

As plaintiffs' request for relief was later refined in pleadings and oral argument in the district court, the alleged "malapportionment" was based upon the proposition that the defendant national political parties failed to allocate delegates to their national convention strictly in accordance of population within the states and the District of Columbia.

The Democratic Party filed a motion to dismiss the complaint on the grounds that it involved a nonjusticiable claim that did not lend itself to the application of judicially manageable standards. In connection with this motion, and in opposition to plaintiffs' motions for summary judgment and for preliminary injunction, the Democratic Party submitted affidavits of Lawrence F. O'Brien, Chairman of the Democratic National Committee (App. 44-49), and of Howard G. Gamser, Counsel to the Rules Commission of the Democratic National Committee (App. 50-56).

These affidavits took note of the fact that, at that time, there was no delegate allocation formula in effect for the Democratic Party. Mr. O'Brien's affidavit stated:

> "The Democratic Party is today in the process of a searching reexamination of every phase of Party life to determine how the Party can be modernized to meet the needs of the nation and the Party in the 1970's." (App. 44).

Two major reform commissions, established following the 1968 Democratic National Convention, were then at work on an overhaul of the procedures of the Democratic Party to make them more responsive to the present-day needs of all the American people.

One such commission—the Commission On Party Structure and Delegate Selection—was designed to reform the methods by which specific delegates are *selected* to attend the Democratic National Convention. (See

App. 44-47). The area of this Commission's responsibility, essentially dealing with matters within a state, is not involved in this legal action.[3]

A second reform commission—the Rules Commission of the Democratic National Committee, chaired by Congressman James G. O'Hara—was designed to overhaul the structure of the national party. Established pursuant to a mandate voted by 2,622 unanimous votes of the delegates to the 1968 Convention of the Democratic Party, the O'Hara Commission was to study the establishment and reform of Party rules on subjects relating to the Convention, including methods of allocating delegates among the states. It has provided all interested persons, including appellants in this appeal, an opportunity to be heard on these subjects. It actively solicited the broadest range of views and held hearings throughout the nation. (App. 51-56). However, at the time the motion to dismiss was filed, this Commission had not completed its study of a delegate allocation formula for the 1972 Democratic National Convention.

The Republican National Committee also filed a motion to dismiss on the ground that the claim stated in the complaint did not present a justiciable issue. In response to plaintiffs' motions, it also argued that the allocation forumla for the 1972 Convention for the Republican Party, which had been adopted irrevocably by the 1968 Convention of the Republican Party, was consistent with the Equal Protection Clause of the Fourteenth Amendment.

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[3] The Commission On Party Structure and Delegate Selection sought to establish means by which all Democrats will have a "full, meaningful and timely opportunity" to participate in the selection of delegates to the 1972 Convention of the Democratic Party. This Commission's Report, entitled "Mandate for Reform", was issued in April 1970, and establishes comprehensive guidelines for the process of delegate selection that will strengthen the Democratic Party through assurance of widespread participation by all interested Democrats within each state and the District of Columbia. The Report is Exhibit A to the Affidavit of Lawrence F. O'Brien, filed in the district court on July 15, 1970, and is a part of the record on this appeal. The Guidelines of this Report were adopted by the Democratic National Committee at a meeting on February 19, 1971, as reflected in the Preliminary Call to Convention, pp. A-5 - A-6, *infra*.

Following further responses of pleadings, the case was heard before Judge John Lewis Smith, Jr., on November 6, 1970.

On November 24, 1970, the memorandum and order of the district court was filed, concluding that "the claim in this action does not admit to judicial relief as there are no judicially discoverable and manageable standards by which to frame appropriate relief." (App. 63). The court also concluded that allocation formulas that had been used by the national political party defendants were "employed to further their legitimate purposes and are neither arbitrary, capricious or violative of any right guaranteed under the Fourteenth Amendment." (App. 62). Accordingly, the court denied plaintiffs' motion for summary judgment and granted the motions of defendants to dismiss the complaint.

Following entry of judgment, appellants filed a notice of appeal in this court on December 7, 1970.

C. The Delegate Allocation Formula For the 1972 Democratic National Convention.

In February 1971, the Rules Commission of the Democratic National Committee reported to the Democratic National Committee its recommendations for a formula by which delegates to the 1972 Democratic National Convention would be selected.

Considering these recommendations, and those of its Executive Committee, the full Democratic National Committee met in Washington on February 19, 1971, and adopted a Preliminary Call for the 1972 National Democratic Convention. This Preliminary Call to Convention, which is reproduced in full in Addendum I hereto, deals with delegates to the 1972 Democratic National Convention—their allocation among the states, the means by which they should be selected (with a "full, meaningful and timely opportunity" of all Democrats to participate), and the procedures by which challenges to their selection will be heard.

This Preliminary Call established the following allocation formula for delegate votes to the 1972 Democratic National Convention:

1. There will be a total of 3,016 Convention votes for the 1972 Democratic National Convention.

2. Each state and the District of Columbia will receive three Convention votes for each of its votes in the Electoral College (for a total of 1,614 Convention votes).

3. Each state and the District of Columbia will receive such additional Convention votes as are determined by distributing 1,386 Convention votes among the states and the District of Columbia on the basis of the average number of votes for the Presidential and Vice Presidential nominees of the Democratic Party in the past three Presidential elections. In the case of the District of Columbia, whose citizens did not have the right to vote in the 1960 election, and in the case of Alabama, whose citizens were denied the right in the 1964 election to vote for nominees of the Democratic Party, the average was based on two elections.

The 1,386 votes were determined as the total remaining after deducting 1,614 votes from the total number of Convention votes, 3,000, that the O'Hara Commission recommended for the states and the District of Columbia. The final total for the Convention became 3,016 when 16 votes for the Commonwealth of Puerto Rico and the Territories were added.

4. Sixteen Convention votes will be distributed among the Commonwealth of Puerto Rico and the Territories as follows:

Canal Zone	3
Guam	3
Puerto Rico	7
Virgin Islands	3

Thus, the allocation formula gives approximately equal weight to (a) a state's relative potential influence in the outcome of the Presidential

election, expressed by Electoral College votes, and (b) a state's relative Democratic strength, measured by the Democratic vote for President in the elections of 1960, 1964 and 1968. Specific numbers of Convention votes were allocated to the Commonwealth of Puerto Rico and the Territories, which have been represented at conventions of the Democratic Party since before the turn of the century. Otherwise they would receive no votes, because they do not participate in Presidential elections. Beyond that, the two standards for allocation–Electoral College strength and Democratic strength–were applied evenly, in mathematical proportions, to all States and the District of Columbia. There was no arbitrary allocation of any fixed number of votes on any basis. "Victory bonus" votes–*i.e.*, a flat number of votes based on past election results in a state–were not given.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE COMPLAINT DID NOT PRESENT A JUSTICIABLE ISSUE

The appellants have not addressed their attack in this lawsuit toward any particular aspect of the formula actually employed by the national political parties that are defendants in this action. Their claim is based entirely on the proposition that *any* method of delegate allocation by political parties other than an allocation based solely on population constitutes a breach of the rights of Georgia voters under the Fourteenth Amendment of the Constitution.[4]

The district court ruled, correctly we submit, that this action seeking a single constitutional rule dictating the allocation of delegate strength to national party conventions did not present a claim that lent itself to the

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[4] Appellants' principal objection to defendants' methods of allocating delegates, apparently, is to defendants' recognition of the relative strength of their political parties in different states. The effect of the constitutional rule sought by plaintiffs would be to deny political parties the right to take relative party strength into account in allocating delegates to national party conventions.

application of "judicially discoverable and manageable standards." (App. 63). Hence, in line with the leading decision of *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 287 F. Supp. 794 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968), the court concluded that the complaint should be dismissed because it did not state a justiciable claim under the criteria for justiciability spelled out in the Supreme Court's landmark decision in *Baker* v. *Carr*, 369 U.S. 186 (1962). We submit that this conclusion is clearly correct and should be affirmed.

At the outset, we observe that the allocation of delegates to national party conventions involves legitimate considerations quite unlike those involved in the election and apportionment cases relied upon by appellants. Beginning with *Baker* v. *Carr*, 369 U.S. 186 (1962), these voting cases have defined a guarantee of equal voting strength for voters in all elections of government officials, based upon the underlying proposition that elected government officials should represent all the people, not narrow factions or special interest groups.[5] As summed up in *Hadley* v. *Junior College District*, 397 U.S. 50, 56 (1970), the Supreme Court's decisions establish that:

> "...as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."

Thus, whenever a state commits itself to a *popular election* of governmental officials, the Equal Protection Clause requires that every voter should have an even chance to make his vote count and every citizen should be equally represented.

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[5] As succinctly stated in *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964): "Legislators represent people, not trees or acres."

These salutary principles are completely consistent with an allocation of delegates to national political party conventions that take account of, for example, political party strength. Surely, in the context of political party conventions, a "one Democrat, one vote" principle—which is a major element of the formula for the 1972 Democratic National Convention—does not offend the Constitution. At the same time, we submit, the Constitution does not require a formula based on "one Democrat, one vote" alone, when it is from people in all States, including those who are not Democrats, that the Democratic Party seeks support and when the Constitution provides that the President shall be elected through the Electoral College process.

It is the manifest absence of appropriate judicial standards to define a single constitutional rule for the allocation of delegates to national party conventions that supports the correctness of the district court's judgment that plaintiffs' request for relief did not present a justiciable claim.

A. There Are No Judicially Manageable Standards By Which a Court May Evolve a Single Constitutional Rule Governing Delegate Allocation To National Conventions.

(1) There Is A Divergence of Legitimate Political Views On Delegate Allocation.

That plaintiffs' request for relief defies the application of judicial standards is evident from the peculiarly political considerations that enter into the allocation of delegate strength at a national political convention. For the allocation of delegate strength may be a significant reflection of the policies and objectives of a political party.

The policies and objectives of the Democratic Party have changed, sometimes drastically, over the Party's century and a half of existence. From time to time, in response to changed circumstances and modified political needs, the Democractic Party, and the Republican Party as well,

have amended the basis upon which delegates to their respective conventions have been allocated. For every national convention since 1940, the Democratic Party has made some change in the basis upon which it has allocated delegate votes among the states and the District of Columbia.

There have been serious proposals, vigorously advanced, urging allocation of delegate votes among the states:

–On a basis of Electoral College participation;

–On some particular measure of Democratic strength;

–On a basis of population;

–On a basis that includes other claims to representation, such as the claim of residents of United States territories, or would provide incentives for state parties or groups; or

–On various combinations and variations of the foregoing bases.

In fact, neither the Democratic Party nor the Republican Party has ever allocated delegates exclusively on the basis of the total population of the state, as urged by appellants.[6] This fact reflects that neither Party has felt that such a basis of allocation was adapted to meeting all legitimate claims for representation, to broadening of the Party's base, and to presenting the Party's program most effectively.

There are a wide variety of strongly held views among political figures, scholars and other as to what allocation method should be employed by the Democratic Party.[7] In a free democratic society such as ours resolution of these conflicting views is best achieved through political processes.

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[6] See P. David, R. Goldman & R. Bain, *The Politics of National Party Conventions* 164-92 (1960) [hereinafter cited as *Party Conventions*].

[7] For a distillation of some of the divergent views on delegate allocation expressed to the Rules Commission of the Democratic National Committee, see Exhibit B to the affidavit of Howard G. Gamser, filed in the district court on July 15,1970. See also *Party Conventions* 164-92, for a survey of alternative criteria for delegate allocation for national political parties.

We believe it is essential in an open democratic society that varying and conflicting ideas of public policy be presented clearly and effectively to the public. Our system depends on such open voicing and debate of ideas to inform the voters—who must make the fundamental public policy decisions—of the choices that are before them. For these reasons, it is essential that political parties—major institutions for the presentation of political and public policy views—should be free to present such views in whatever manner they believe to be most effective. A party's effectiveness in putting forward public policy alternatives is in substantial part a function of the manner in which it organizes itself and conducts its affairs. One of the judgments that a political party must make, accordingly, in determining how most effectively to advance its ideas is how best to organize itself and conduct its affairs, including the manner of allocating delegate strength. The imposition of the delegate allocation formula sought by plaintiffs would thus deny political parties a significant element of flexibility in presenting their views and candidates and would, therefore, entrench to some extent on the free competition of ideas and public policy alternatives.[8]

Of course, once a political party has organized itself and defined its political objectives, it must submit its programs and its candidates to the judgment of the public in a popular election. The courts should not, we submit, encroach upon the public's freedom and responsibility to pass judgment on competing public policy alternatives by announcing a delegate allocation rule that could impair the ability of any group to organize in the fashion it believes would make it most effective in advancing its programs and candidates in popular elections.

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[8] The constitutional rule sought by plaintiffs would put an end to political experimentation on delegate allocation in conflict with the principle, which the Supreme Court has recently reaffirmed, that the political system should retain flexibility that will assure that legitimate political goals of representation are achieved. *Hadley* v. *Junior College District*, 397 U.S. 50, 59 (1970); *Sailors* v. *Board of Education*, 387 U.S. 105, 110-11 (1967).

(2) There Is a Demonstrated Need For Political Parties To Retain Flexibility To Adjust To Political Realities.

For many years, both major political parties used an allocation formula based on the Electoral College votes of a state.[9] The circumstances of the first departure from this measure, by the Republican Party following the 1912 Presidential election, effectively rebut any idea that a national political party does not need flexibility in methods of delegate allocation in order to respond to legitimate political needs.

In 1912, the Republican Party's delegates from the Southern states were overrepresented, in terms of Republican strength, at the National Convention of the Republican Party due to the fact that allocation of delegates was on the basis of votes in the Electoral College. In a closely contested race for the nomination, the Southern delegates were decisive in President Taft's renomination over former President Theodore Roosevelt. The result was a splintering of Republican forces and the development of the Bull Moose movement, which has often been credited with the defeat of the Republican nominee by Woodrow Wilson, the Democratic Party nominee.[10]

For the next convention, in 1916, the Republican Party put into effect a formula that awarded delegate votes to states in proportion to the votes cast by each state for the Republican nominee in the 1908 election or for the Republican candidates in the 1914 Congressional election, in addition to delegates votes reflecting votes in the Electoral College. It is difficult to conclude, we submit, that this action was an illegitimate or undemocratic political response to the results in 1912, but it is a response that would be barred under the constitutional rule sought by plaintiffs.[11]

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9 *Party Conventions* 164-66.

10 *Party Conventions* 166-67.

11 *Id.*

The loss of flexibility by such a constitutional rule could result in additional harm to our political system. Thus, for example, such a rule might bar the granting of delegate votes for the Democratic Convention to the territories of the United States and to the Commonwealth of Puerto Rico. The Democratic Party has provided, in its formula for the 1972 Convention, that the Canal Zone, Guam and the Virgin Islands each should have three convention votes and Puerto Rico should have seven votes. Yet under a theory that the allocation of delegates should be related to representation in the voting in the general election, these territories and the Commonwealth would be entitled to no representation, since they do not vote in the presidential elections. Yet, their representation may well be vitally important to the continued participation of these areas, with their long-standing close ties to the United States, in our political system.

In summary, the allocation of delegates to a national convention involves numerous, often competing, considerations as to what delegate allocation basis is best adapted to the then-current needs of a political party. The political process is the only forum in which these considerations can be appropriately balanced and reconciled. If the Court in this action were to rule that this subject is justiciable and that a single constitutional standard of delegate allocation based on population should be imposed, legitimate political considerations that have been reflected in allocation formulas in the past would be foreclosed, along with opportunities for experimentation. We submit that such a ruling would impair and inhibit our democratic processes and should not be made.

(3) The Absence Of Manageable Judicial Standards for Delegate Allocation Is Acutely Evident When Problems Of Third Parties Are Considered.

Appellants seek relief against the Democratic Party and the Republican Party. But it is evident that a decision in this action may well apply

to other political parties.[12] We believe that third parties would be adversely affected, perhaps even more acutely than the political parties that are defendants in this action, by a decision imposing a particular constitutional requirement in delegate allocation.

The reason that a single constitutional standard in allocation of delegates to a national convention may place unreasonable obstacles in the way of third parties is that such parties have rarely developed with national support, but have instead characteristically enjoyed regional support.[13] Plainly an across-the-board rule that bars a third party from recognizing its regional support may well hamper its development.[14] At the same time, a constitutional rule that required a third party to constitute its conventions solely on the basis of existing support, or solely on some basis relating to the appeal of its platform issues, could hamper its efforts to expand its base of support.

Under a constitutional rule that delegate strength must be allocated strictly on the basis of population, the organizational ability of a party with narrow platform issues might be impaired. Thus, for example, a Youth Party, organized perhaps around the platform that 16-year-olds should be entitled to vote, might want to organize on the basis of some index of youth, such as one delegate for each college and high school, but would be prohibited from organizing itself in that way under the constitutional rule sought by appellants.

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12 In *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), the Supreme Court rejected the argument that the courts should distinguish between kinds of elections for government officials in deciding whether qualified voters should be entitled to participate in a particular election on an equal footing. It said: "[C]ourts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task." *Id*. at 55. Similarly, in the case of Political conventions, the courts would have difficulty in attempting to apply one rule to the Democratic Party and the Republican Party and a different rule, or no rule, to other political parties.

13 See F. Haynes, *Third Party Movements Since the Civil War* 1 (1966).

14 See *Party Conventions* 177.

Accordingly, we submit that there are no acceptable standards for a court to evolve a constitutional rule for delegate allocation that give effect to the legitimate needs of political parties to organize to advance effectively the political beliefs of their members.

B. The Persuasive Decisions of the Courts Support the Proposition That the Complaint Does Not Involve a Justiciable Claim.

The leading case with respect to the justiciability of delegate allocation for political conventions is *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 287 F. Supp. 794 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968). In material respects indistinguishable from this case, *Irish* held that allocation within Minnesota of delegates for the Democratic National Convention is not justiciable under the standards of *Baker* v. *Carr*, 369 U.S. 186 (1962).

Appellants' brief does not mention *Irish* at all. Instead, so far as the issue of justiciability is concerned, appellants rely entirely on a district court decision, *Maxey* v. *Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970), *appeal pending* (No. 71-1051, 9th Cir.), which concluded, *ipse dixit*, that the allocation of convention delegates within a state was justiciable. *Id*. 677. But *Maxey* did not hold that a federal court is a proper forum to write delegate allocation formulas for political parties. In striking down certain practices not involved in the allocation formula of the National Democratic Party before the court in this case[15] the court in *Maxey* simply admonished the Washington State Democratic Party to adopt a formula for allocating delegates within the state that was fair in terms of Democratic voters and of population (the

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[15] In *Maxey*, the court declared unlawful the past practice of the Democratic Washington State Central Committee "to apportion an equal number of 'basic votes' to each county and to apportion 'bonus votes' to counties on the basis of party plurality in the last presidential election." 319 F. Supp. at 682; see *id*. at 681. Neither such practice is involved in the allocation formula of the National Democratic Party before the Court in this case.

Electoral College formulation not being applicable within a state). 319 F. Supp. at 679, 681. It did not purport to write such a formula.

We believe that a realistic analysis of the standards for justiciability outlined in *Baker* v. *Carr* leads to the conclusion that the claim in this case is not justiciable. We also believe that the starting point for such an analysis of this issue is the fact that, in a long line of decisions in various jurisdictions and contexts the courts have declined to involve themselves in disputes involving political parties.[16] In fact, the courts have repeatedly declined to impose rules on the management of political parties in the face of constitutional claims that groups or areas should be represented within a political party strictly on the basis of population or any other particular standard. *Lynch* v. *Torquato*, 343 F.2d 370 (3d Cir. 1965); *State ex rel. Tomblin* v. *Bivens*, 150 W. Va. 733, 149 S.E.2d 284 (1966); *Rogers* v. *State Committee of Republican Party*, 96 N.J. Super. 265, 232 A.2d 852 (1967); *Azevedo* v. *Jordan*, 237 Cal. App. 2d 521, 47 Cal. Rptr. 125 (1965).

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16 *Foster* v. *Ponder*, 235 Ark. 660, 361 S.W. 2d 538 (1962) (writ of prohibition granted to prevent lower court inquiring into ouster of county committee members); *State ex rel. Smith* v. *Bosworth*, 145 W. Va. 753, 117 S.E. 2d 610 (1960) (court without jurisdiction to consider questioned election of county chairman); *State ex rel. Padgett* v. *Vanderburgh Circuit Court*, 236 Ind. 43, 138 N.E. 2d 143 (1956) (court without jurisdiction to pass upon Democratic Party lists); *Wagoner County Election Board* v. *Plunkett*, 305 P.2d 525 (Okla. 1956)(court without jurisdiction to consider legality of candidate selection); *Democratic-Farmer-Labor State Central Committee* v. *Holm*, 227 Minn. 52, 33 N.W. 2d 831 (1948) (court will not inquire into question of which candidates really represent the party); *Wall* v. *Currie*, 147 Tex. 127, 213 S.W. 2d 816 (1948) (court without jurisdiction to determine whether county chairman validly elected); *Sbarboro* v. *Jordan*, 164 Cal. 51, 127 P. 170 (1912) (court will not pass on whether Roosevelt electors are Republicans); *Hutchinson* v. *Brown*, 122 Cal. 189, 192, 54 P. 738, 739 (1898) (court will not pass on proper representatives of Populist Party); *Phillips* v. *Gallagher*, 73 Minn. 528, 76 N.W. 285 (1898) (court will not inquire into proper party nominee); *State ex rel. McCurdy* v. *De Maioribus*, 9 Ohio App. 2d 280, 224 N.E. 2d 353 (1967) (court refused to assert jurisdiction over manner of selecting chairman of Republican Central Committee); *Wallace* v. *Cash*, 828 S.W. 2d 516 (Ky. App. 1959) (court lacks jurisdiction to review party method of nominating candidates). *Cf. Bentman* v. *Seventh Ward Democratic Executive Committee*, 421 Pa. 188, 218 A.2d 261 (1966) (specific election law created mandamus jurisdiction to compel executive committee to seat two lawfully elected party committeemen).

This overwhelming weight of authority, read in the light of *Baker* v. *Carr*, 369 U.S. 186 (1962), calls for the conclusion that the present case is not justiciable. In *Baker* v. *Carr*, the Supreme Court ruled that an asserted malapportionment of the State Legislature of Tennessee, with respect to population, was a justiciable claim upon which the federal courts could render a decision on the merits.[17] In that decision, the Supreme Court reviewed its past decisions that particular cases involved nonjusticiable "political" questions. The Court concluded that the analytical thread that ran through those decisions was the absence of "judicially discoverable and manageable standards." *Id.* at 217; see also *id*. at 211 and 214. In this connection, the Court observed that in those decisions the lack of such standards led to "the impossibility of [the Court's] deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217.

It was in *Irish*, not long before the Democratic Party Convention in 1968, that the federal courts first had occasion to apply these criteria to the question whether matters relating to delegate allocation to political conventions were justiciable. The ruling was that such matters were not justiciable, because delegate allocation involved the resolution of legitimate, conflicting political claims to representation, which is a matter that did not, the court concluded, lend itself to "judicially discoverable and manageable standards." *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 287 F. Supp., 794, 805 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968).

The facts in *Irish* are indistinguishable in material respects from those involved in this action. *Irish* involved a challenge to selection by the Democratic-Farmer-Labor Party of Minnesota of delegates for the Minnesota delegation to the Democratic National Convention. The challenge

[17] At issue in *Baker* v. *Carr* was a 1901 statute enacted by the Tennessee General Assembly prescribing a formula for the apportionment of the members of the Tennessee Senate and the Tennessee House of Representatives. That formula had not been changed since 1901, although the population of Tennessee had expanded greatly and the population distribution within the state had changed significantly. See 396 U.S. at 189-95.

related, in part, to a geographically based discrimination in favor of small counties and against more heavily populated counties in the making up of the Minnesota delegation for the Democratic National Convention. The challenge in that case was based, as it is in this case, on the proposition that the Equal Protection Clause of the Fourteenth Amendment required that delegates should be allocated in accordance with population, and in accordance with population only. This claim was rejected in that case, as it should be in this case, on the grounds that a justiciable controversy was not presented, because a genuine political question was involved. In *Irish*, the district court said:

> "In the case at bar, there was no maximum put on the number of state convention delegates from each county, but a minimum of six. The party may have good reasons for this to strengthen its own party, to get broad, statewide support, to retain interest in each of the 87 counties in the state, or for other reasons not known to the court, and yet which are not 'invidious' as would be a discrimination on account of race, sex, color or creed. The party should be allowed to manage its own affairs so long as it complies with precinct caucus requirements. *It appears to the court that a primary function of a political party in a democracy is the direction and control of the struggle for political power* among men who may have contradictory interests and often mutually exclusive hopes of securing them. *This the parties do by institutionalizing the struggle and emphasizing positive measures to create a strong and general agreement on policies. A judicial resolution of such conflicts cannot do this.* Lack of 'judicially discoverable and manageable standards' is stressed in Baker v. Carr, supra, 369 U.S. p. 217, 82 S. Ct. 691." 287 F. Supp. at 804. (Emphasis supplied.)

Further, in affirming the district court's decision, the United States Court of Appeals for the Eighth Circuit, through a three-judge panel which included Judge (now Justice) Blackmun, expressly stated that it considered the case to present and pose a nonjusticiable question within the definition enunciated in the majority opinion in *Baker* v. *Carr*. 399 F.2d at 121.

Thus, *Irish* recognized that democratic processes work most effectively for our society when delegate allocation to political conventions is left to the political processes that are best adapted to resolving the competing political considerations inherent in delegate allocation.

As noted, plaintiffs' reliance is entirely upon the decision in *Maxey* v. *Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970), *appeal pending* (No. 71-1051, 9th Cir.).

In the present case, however, the district court correctly observed that Maxey "turned, in material respects, on a statutory commitment of the state of Washington to the popular election of delegates to the national convention." (App. 63). Although appellants in their brief seem to assert (p. 23) that there is no such statute, it will be found quoted in the court's opinion in *Maxey*. 319 F. Supp. at 680. Indeed, the court in *Maxey* emphasized this statutory commitment and relied on it in determining that it should apply *Gray* v. *Sanders*, 372 U.S. 368 (1963), which established that, once a state has committed itself to a popular election and defined the electorate, every man's ballot must count equally with every other's. See 319 F. Supp. at 680. Thus, the result in *Maxey* is consistent with the view expressed by the court in *Irish* that:

> "The State Legislature has the choice to decide whether or not the State should have a Presidential primary election. If it does so, clearly it must protect the rights of individuals under the 'one-man-one-vote' principle. If it chooses not to do so and leaves the matter to political party conventions, this is a political decision and one not to be interfered with by the courts...." *Irish* v. *Democratic-Farmer-Labor Party of Minnesota, supra*, 287 F. Supp. at 805.

There is no universal state commitment to the selection of delegates to national political conventions by popular election.[18] Hence, we submit,

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[18] In 1968, it appears that only approximately 15 of 50 states had provision for election of delegates to national party conventions. See U.S. Senate, *Nomination and Election of the President and Vice President of the United States*, pp. 60-63 (1968).

the holding in *Maxey* cannot be read as establishing a principle that this Court should decide that the delegate-allocation processes of national political parties should be subjected to a constitutional rule based, as appellants urge, strictly on population.

More than that, however, *Maxey* does not hold that federal courts are appropriate forums to write delegate allocation formulas for national political parties. To be sure, the court stated that the question of delegate allocation was justiciable (319 F. Supp. at 677) and struck down certain practices not pertinent to the issues on this appeal (*id*. at 686). When it came to writing an allocation formula, however, the court said:

> "the strictures of *Gray* and the one-man-one-vote principle require that the allocation be made on some rational population basis. Either total population or total Democratic voters as measured by the Democratic vote in the last Presidential election should set the equal-vote requirement."
>
> * * *
>
> "Finally, the court must face the question of appropriate relief. There is no need at this time to undertake to determine what the appropriate delegate apportionment formula for the state and county conventions might be in order to bring the procedures into compliance with the one-man-one-vote principle. Nor is it necessary to decide the proper basis for apportionment, whether total population, or total Democratic votes counted in the 1968 presidential elections. These questions are best decided in the first instance by the state committee, which is much closer to its party and its needs than is any court." 319 F. Supp. at 679 and 681.

Thus, *Maxey* appears to acknowledge that the federal courts are not competent to write a delegate allocation formula applicable to political parties as a constitutional rule.

In sum, all persuasive decisions of the courts are in line with the proposition that the claim presented by appellants is not justiciable, and the district court's judgment dismissing the complaint should therefore be affirmed.

II. THE DEMOCRATIC PARTY'S ALLOCATION OF DELEGATES ON THE BASIS OF ELECTORAL COLLEGE STRENGTH AND RELATIVE DEMOCRATIC STRENGTH IS CLEARLY CONSISTENT WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION

For the reasons stated in Part I of this brief, it is our view that the claim by appellants seeking a single constitutional rule for the allocation of delegates to conventions of national political parties does not present a justiciable question. It is our further view that the Democratic Party's method of allocating delegates is manifestly fair and is in all respects consistent with the Equal Protection Clause of the Fourteenth Amendment.

If the court concludes that the subject of the complaint is justiciable and proceeds to the merits, we note that any decision on the merits of particular aspects of allocation formulas requires a determination whether such aspect constitutes an "invidious" discrimination. It is only "invidious" discriminations that are barred by the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, *Dusch* v. *Davis*, 387 U.S. 112, 116 (1967).

By this standard, the allocation formula of the Democratic Party is clearly lawful. We submit that every aspect of the formula is reasonable and that none contains any arbitrariness rising anywhere near the level of an "invidious" discrimination. Specifically, we note that there is nothing in the Democratic Party's formula like the award of "victory bonus" votes struck down in *Maxey* v. *Washington State Democratic Committee*, 319 F. Supp. 673, 682 (W.D. Wash. 1970), *appeal pending* (No. 71-1051, 9th Cir.).

The Democratic Party's allocation of delegates among the states and the District of Columbia represents a uniform application, in mathematical proportions, for each state and the District of Columbia of (a) its Electoral College strength and (b) its relative Democratic strength. As shown below, this formula is entirely rational and is fair to all legitimate interests of the people and Democrats of the states and the District of Columbia.

(1) *Electoral College Strength*—The President and Vice President of the United States are elected by electors of the Electoral College. Article II, Section 1, clause 2, of the Constitution provides: "Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." In addition, pursuant to the Twenty-Third Amendment, the District of Columbia has three Electoral College votes.

Article II, Section 1, clause 2, of the Constitution in effect carries forward to the Electoral College to some degree the compromise of the Founding Fathers in 1787 that established a Senate, with each state represented by two senators, and a House of Representatives, with the number of representatives determined by the population within the various states.[19] In the Electoral College, due to the equal weighting for Senators and members of the more numerous House of Representatives, population is nevertheless the principal determinant of a State's Electoral College vote.

At every convention of the Democratic Party, and the first was in 1832, Electoral College strength has been a determinant of the number of convention votes to be allocated to each state for the Party's national convention. Indeed, apart from votes for territories and similar governmental divisions, Electoral College strength was the sole criterion for

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[19] See J. Roche, *The Founding Fathers: A Reform Caucus In Action*, Am. Pol. Sci. Review (Dec. 1961) 799, 810; N. Pierce, *The People's President* 36-37 (1968).

allocating votes among the states by the Democratic Party until the convention in 1944.[20]

We submit that the allocation of delegate votes among the states and the District of Columbia by the Democratic Party on the basis of Electoral College strength—the factor that will determine the outcome of the election for President and Vice President of the United States in 1972 unless constitutional amendments are made—is clearly consistent with the Equal Protection Clause of the Fourteenth Amendment.

(2) *Democratic Strength*—In addition to an allocation on the basis of a State's Electoral College strength, the Democratic Party has provided for the allocation of nearly half of the delegate votes for the 1972 convention on the basis of the relative Democratic strength within the states. This has been done by allocating among the states a total of 1,386 delegate votes (of a convention total of 3,016 votes) on the basis of an average of the state's votes for the Presidential and Vice Presidential candidates of the Democratic Party in the elections of 1960, 1964 and 1968.[21] We submit that it is altogether fair to the citizens and residents of the states and the District of Columbia that weight should be given to Democratic strength in the allocation of delegate votes among the states and the District of Columbia.

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[20] See *Party Conventions* 168, 183. See also Answer of Defendant Democratic National Committee to Plaintiffs' Interrogatories Numbered 12, 13(a) and 13(b), filed in the district court on June 8, 1970, pp. 1-8, for the text of the Democratic Party's allocation formulas for each convention since 1896.

[21] In the case of the District of Columbia, whose residents were unable to vote for the candidates for President and Vice President of the United States in 1960, the average was based simply on the votes cast in 1964 and 1968, when District of Columbia residents were able to vote in the Presidential elections. Similarly, in the case of Alabama the average was based on the votes cast for nominees of the Democratic Party in 1960 and 1968, since there were no electors on the ballot pledged to the candidates of the Democratic Party in Alabama in 1964 and the state's citizens were therefore unable to vote for the Democratic Party's nominees.

We further submit that the particular measure of Democratic strength used—an average of the votes for the Democratic Party's Presidential and Vice Presidential candiates in 1960, 1964 and 1968—is fair and reasonable. This is a measure of Democratic strength that is, more than any other possible measure, related to the Democratic strength relevant to a Presidential election, namely, the strength of the Democratic Party on a national scale, reflected by votes cast for Democratic Party nominees for national office.[22]

(3) *Commonwealth and Territories*—For the 1972 convention, the Democratic Party has allocated three votes each to Canal Zone, Guam and the Virgin Islands and seven votes to the Commonwealth of Puerto Rico. These sixteen convention votes reflect long standing close ties between the United States and the Commonwealth of Puerto Rico and the territories and is, in the opinion of the Democratic Party, a vital element for retaining their interest and participation in the political processes of the United States.[23]

Indeed, there exists a unique relationship between the United States and the Commonwealth of Puerto Rico, dating from the enactment in 1950 of P. Law 600, 81st Cong. (Act of July 3, 1950), 64 Stat. 319, 48 U.S.C. §§ 731b-731d, providing for the establishment of a union of common citizenship, common defense, common currency, a free market and common loyalities to the values of democracy.[24]

In the face of such deep ties affecting the interests of the nation's citizens, we submit that the allocation of sixteen votes to the Commonwealth of Puerto Rico and the territories can hardly be said to constitute

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[22] It may also be noted that by using an average of the three elections, in 1960, 1964 and 1968, the allocation formula of the Democratic Party tends to remove any distortions that might result from a calculation based on any single election.

[23] The Democratic Party has made provision for convention votes for territories and similar governmental units at least since 1900. See Answer of Defendant Democratic National Committee to Interrogatories Numbered 12, 13(a) and 13(b), filed June 8, 1970, pp. 1-8. Territories receiving such votes included Hawaii, Alaska and the District of Columbia, which have since achieved full status in our national electoral system.

[24] See Resolution No. 1, approved December 3, 1962, by the Legislative Assembly of Puerto Rico, in 1 *Laws of Puerto Rico Anno.* 151-54.

an "invidious" discrimination against the voters and citizens of any state or the District of Columbia.

Accordingly, we submit that the Democratic Party's method of allocating delegates among the states and the District of Columbia, as well as the territories and the Commonwealth of Puerto Rico, is manifestly fair and is in all respects consistent with the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

CONCLUSION

For the reasons stated, the order and judgment of the district court should be affirmed.

Respectfully submitted,

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ADDENDUM I

PRELIMINARY CALL FOR THE 1972 DEMOCRATIC NATIONAL ~~COMMITTEE~~ CONVENTION

DELEGATES TO CONVENTION

February 19, 1971

TO WHOM IT MAY CONCERN:

By authority of the Democratic National Committee, the National Convention of the Democratic Party is hereby called to meet, at a time and place in 1972 to be designated at a later date, to select nominees for the Offices of President and Vice President of the United States of America, to adopt and promulgate a platform and to take such other actions with respect to any other matters as the Convention may deem advisable.

I. DISTRIBUTION OF DELEGATE VOTES.

Notice is hereby given that the following resolutions have been approved by the Democratic National Committee, acting by authority of the 1968 Democratic National Convention, with respect to the distribution of delegate votes among the delegations to the Convention:

> BE IT RESOLVED by the Democratic National Committee that the distribution of votes, delegates and alternates to the 1972 Democratic National Convention shall be in accordance with the following:

(1) The total number of Convention votes for the delegates to the Convention shall be 3016 as set forth in the compilation included in this resolution and determined as provided in paragraphs (2), (3) and (5) hereof.

(2) Each State and the District of Columbia shall receive three Convention votes for each of the Electors from that State or the District of Columbia in the Electoral College.

(3) Each State and the District of Columbia shall receive such additional Convention votes as are determined by distributing 1386 Convention votes among the States and the District of Columbia based upon the relationship between (i) in the case of each State other than Alabama, one-third of the number of votes cast in such State in favor of the Presidential and Vice Presidential nominees of the Democratic Party in the 1960, 1964 and 1968 elections and, in the case of Alabama, one-half of the number of such votes cast in the 1960 and 1968 elections, and, in the case of the District of Columbia, one-half of the number of such votes cast in the 1964 and 1968 elections and (ii) one-third of the total number of votes cast in all States other than Alabama in favor of the Presidential and Vice Presidential nominees of the Democratic Party in the 1960, 1964 and 1968 elections plus one and one-half times the total number of such votes cast in Alabama in the 1960 and 1968 elections and in the District of Columbia in the 1964 and 1968 elections.

(4) Each State or the District of Columbia that receives less than 20 Convention votes pursuant to paragraphs (2) and (3) hereof may select 20 voting delegates to the Convention to cast the total Convention votes received by the State pursuant to paragraphs (2) and (3) hereof.

(5) Canal Zone, Guam, Puerto Rico and Virgin Islands shall have 16 Convention votes, distributed as follows:

Canal Zone	3
Guam	3
Puerto Rico	7
Virgin Islands	3

Canal Zone, Guam and Virgin Islands each may select 6 voting delegates, and Puerto Rico may select 14 voting delegates, to cast the total Convention votes received by each pursuant to this paragraph (5).

(6) Each State, the District of Columbia, Canal Zone, Guam, Puerto Rico and Virgin Islands, in accordance with procedures consistent with the "full, meaningful and timely opportunity" mandate of the 1968 Democratic National Convention, shall select during the calendar year 1972 a nominee to serve as national committeeman and a nominee to serve as national committeewoman beginning upon their confirmation by the 1972 Democratic National Convention, which nominees shall serve as voting delegates to the 1972 Democratic National Convention and whose votes or fractions thereof shall be counted as a part of the total number of Convention votes received pursuant to paragraphs (2), (3) and (5) hereof by such State, the District of Columbia, Canal Zone, Guam, Puerto Rico or Virgin Islands.

(7) Each State, the District of Columbia, Canal Zone, Guam, Puerto Rico, and Virgin Islands may select a number of alternates equivalent to the sum of (i) one alternate for each of the first 20 Convention votes received by it pursuant to paragraphs (2), (3) and (5) hereof, (ii) one alternate for each two Convention votes in excess of 20 but less than 101 Convention votes received by it pursuant to paragraphs (2), (3) and (5) hereof, and (iii) one alternate for each three Convention votes in excess of 100 Convention votes received by it pursuant to paragraphs (2), (3) and (5) hereof.

(8) Any person serving as national committeeman or national committeewoman of the Democratic National Committee as of the time the Convention convenes in 1972, who is not otherwise serving as a voting delegate to the Convention, shall be entitled to serve as a delegate to the Convention, with full rights and privileges of a delegate on matters coming before the Convention.

In accordance with the foregoing provisions, the numbers of Convention votes, delegates and alternates for the delegations to the 1972 Democratic National Convention are the following:

DISTRIBUTION OF VOTES, DELEGATES AND ALTERNATES

	1972 CONVENTION VOTE*	MAXIMUM NUMBER OF ALTERNATES	MAXIMUM NUMBER OF DELEGATES*	MAXIMUM TOTAL DELEGATION*
ALABAMA	37	29	37	66
ALASKA	10	10	20	30
ARIZONA	25	23	25	48
ARKANSAS	27	24	27	51
CALIFORNIA	271	117	271	388
COLORADO	36	28	36	64
CONNECTICUT	51	36	51	87
DELAWARE	13	13	20	33
D.C.	15	15	20	35
FLORIDA	81	51	81	132
GEORGIA	53	37	53	90
HAWAII	17	17	20	37
IDAHO	17	17	20	37
ILLINOIS	170	84	170	254
INDIANA	76	48	76	124
IOWA	46	33	46	79
KANSAS	35	28	35	63
KENTUCKY	47	34	47	81
LOUISIANA	44	32	44	76
MAINE	20	20	20	40
MARYLAND	53	37	53	90
MASSACHUSETTS	102	61	102	163
MICHIGAN	132	71	132	203
MINNESOTA	64	42	64	106
MISSISSIPPI	25	23	25	48
MISSOURI	73	47	73	120
MONTANA	17	17	20	37
NEBRASKA	24	22	24	46
NEVADA	11	11	20	31
NEW HAMPSHIRE	18	18	20	38
NEW JERSEY	109	63	109	172
NEW MEXICO	18	18	20	38
NEW YORK	278	120	278	398
NORTH CAROLINA	64	42	64	106
NORTH DAKOTA	14	14	20	34
OHIO	153	78	153	231
OKLAHOMA	39	30	39	69
OREGON	34	27	34	61
PENNSYLVANIA	182	88	182	270
RHODE ISLAND	22	21	22	43
SOUTH CAROLINA	32	26	32	58
SOUTH DAKOTA	17	17	20	37
TENNESSEE	49	35	49	84
TEXAS	130	70	130	200
UTAH	19	19	20	39
VERMONT	12	12	20	32
VIRGINIA	53	37	53	90
WASHINGTON	52	36	52	88
WEST VIRGINIA	35	28	35	63
WISCONSIN	67	44	67	111
WYOMING	11	11	20	31
CANAL ZONE	3	3	6	9
GUAM	3	3	6	9
PUERTO RICO	7	7	14	21
VIRGIN ISLANDS	3	3	6	9
TOTALS	3016	1897	3103	5000

* Includes members of the Democratic National Committee, who will be delegates with voting privileges.

II. QUALIFICATIONS OF STATE DELEGATIONS.

Notice is hereby given that the Democratic National Committee, pursuant to specific direction of the 1968 Democratic National Convention, has adopted the following resolutions relating to the qualifications of state delegations to the 1972 Democratic National Convention:

> BE IT RESOLVED by the Democratic National Committee that:
>
> (a) It is the understanding that a State Democratic Party, in selecting and certifying delegates to the Democratic National Convention, thereby undertakes to assure that voters in the State, regardless of race, color, creed or national origin, will have the opportunity to participate fully in Party affairs, and to cast their election ballots for the Presidential and Vice-Presidential nominees selected by said Convention, and for electors pledged formally and in good conscience to the election of these Presidential and Vice-Presidential nominees under the Democratic Party label and designation.
>
> (b) It is the further understanding that a State Democratic Party in selecting and certifying delegates and alternates to the Democratic National Convention thereby undertakes to assure that all Democrats of the state will have meaningful and timely opportunities to participate fully in the election or selection of such delegates and alternates.
>
> (c) It is understood that a State Democratic Party in selecting and certifying delegates to the Democratic National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters have had a full and timely opportunity to participate.
>
> In determining whether a State Democratic Party has complied with this mandate, the Democratic National Convention shall require that:
>
> (1) The unit rule not be used in any stage of the delegate selection process, and

(2) All feasible efforts have been made to assure that delegates are elected through party primary, convention or committee procedures, open to public participation within the calendar year of the Democratic National Convention.

Notice is also given that the Democratic National Committee has adopted the following resolution with respect to the Report of the Commission On Party Structure and Delegate Selection to the Democratic National Committee (April 1970), which relates to the requirements of subparagraphs (b) and (c) of the foregoing resolution:

BE IT RESOLVED by the Democratic National Committee that:

(a) With respect to those Guidelines of the Report of the Commission On Party Structure and Delegate Selection to the Democratic National Committee (April 1970) that said Commission "requires" state Democratic Parties to adopt pursuant to the "full, meaningful and timely opportunity" mandate of the 1968 Democratic National Convention, the Democratic National Committee adopts such Guidelines as the standards that state Democratic Parties, in qualifying and certifying delegates to the 1972 Democratic National Convention, must make all efforts to comply with, and

(b) With respect to those Guidelines of said Report that the Commission On Party Structure and Delegate Selection to the Democratic National Committee "urges" state Democratic Parties to adopt, the Democratic National Committee joins in urging the implementation of such Guidelines by state Democratic Parties in qualifying and certifying delegates to the 1972 Democratic National Convention.

III. PROCEDURES FOR CHALLENGING DELEGATES OR STATE DELEGATIONS.

Notice is hereby given that the Democratic National Committee has adopted the following resolutions concerning procedures for challenging delegates selected for the 1972 Democratic National Convention:

> BE IT RESOLVED by the Democratic National Committee that:
>
> (a) There is hereby established a Credentials Committee for the 1972 Democratic National Convention to determine and resolve questions concerning the seating of delegates to the Democratic National Convention, which will report to the 1972 Democratic National Convention for final determination and resolution of all such questions.
>
> (b) Challenges to the seating of any delegate or state delegation shall be in accordance with procedures set forth in "Rules Of Procedure Of the Credentials Committee For the 1972 Democratic National Convention" hereby approved and adopted by the Democratic National Committee.
>
> (c) Any challenge to the seating of any delegate or state delegation that is not made in substantial conformity with said Rules Of Procedure Of the Credentials Committee For the 1972 Democratic National Convention shall be deemed waived.

The Rules Of Procedure Of the Credentials Committee For the 1972 Democratic National Convention approved and adopted by the Democratic National Committee in the foregoing resolution are set forth in full as Appendix A to this Preliminary Call for the 1972 Democratic National Convention.

IV. DELEGATES TO BE SELECTED NOT LATER THAN JUNE 20, 1972.

Notice is hereby given that the Democratic National Committee has adopted the following resolutions:

BE IT RESOLVED by the Democratic National Committee that all State Parties are requested to take all steps necessary and appropriate to complete the process of selecting delegates not later than June 20, 1972.

BE IT FURTHER RESOLVED by the Democratic National Committee that additional resolutions will be issued at a later date dealing with the time and place of the Convention and other matters and such additional resolutions will be included in a further Call for the 1972 Democratic National Convention.

LAWRENCE F. O'BRIEN
Chairman,
Democratic
National Committee

RULES OF PROCEDURE
OF THE CREDENTIALS COMMITTEE
OF THE 1972 DEMOCRATIC NATIONAL CONVENTION

CHALLENGES TO DELEGATES
OR STATE DELEGATIONS

RULES OF PROCEDURE
OF THE CREDENTIALS COMMITTEE
OF THE 1972 DEMOCRATIC NATIONAL CONVENTION

CHALLENGES TO DELEGATES
OR STATE DELEGATIONS

Rule 1 – FILING, PARTIES AND SERVICE OF DOCUMENTS – IN GENERAL

(a) FILING – The filing of any document provided for in these Rules may be accomplished by causing copies thereof to be delivered, or to be mailed first class mail (airmail when the distance is greater than 300 miles), to: Chairman, Credentials Committee, c/o Democratic National Committee, 2600 Virginia Avenue, N.W., Washington, D.C. 20037. Ten copies of any document shall be filed, unless a greater number of copies of such document is required by these Rules. Filing shall be deemed complete upon mailing or delivery.

(b) PARTIES – Parties to any proceeding under these Rules shall include (1) any person or group of persons filing a challange to any delegate or state delegation pursuant to these Rules, (2) any state delegation, if a challenge is directed to such entire state delegation, (3) any challenged individual delegate or group of delegates, if a challenge is directed to less than an entire state delegation, and (4) any other person designated as a party by the Chairman of the Credentials Committee. For purposes of these Rules, the term "state" shall include the District of Columbia, Puerto Rico, the Virgin Islands, the Canal Zone and Guam.

(c) SERVICE OF DOCUMENTS – Any document filed pursuant to these Rules shall be served upon all other parties to any proceeding under these Rules by causing a copy thereof to be delivered or mailed, first class mail (airmail when the distance is greater than 300 miles), to each party or his attorney designated in accordance with the provisions of these Rules. Any document filed and served pursuant to these Rules shall be accompanied by a statement by the party filing the document or his attorney specifying the date of delivery or mailing of such document and the name and address of each person to whom the document was delivered or mailed.

Rule 2 – NOTICE OF INTENT TO CHALLENGE

(a) A challenge to a delegate or state delegation may be made only by residents of the state whose delegation is challenged or of the state in which a challenged individual delegate resides.

(b) A challenge to a delegate or state delegation shall be instituted by the filing by a person eligible to make such challenge of Written Notice of Intent to Challenge with the Chairman of the Credentials Committee within 10 calendar days after any challenged delegate or delegation has been selected, which Written Notice shall be served upon the State's Democratic Chairman and any challenged individual delegates upon the date of filing.

(c) As soon thereafter as possible, but in no event more than 5 calendar days after the Notice of Intent to Challenge has been filed, the challenging party shall file with the Credentials Committee the following:

(i) A specification of the state delegation or group of delegates challenged, or, if individual delegates are challenged, a description of the individual delegates challenged, including their names and addresses if known to the challenging party.

(ii) A short and concise statement of the alleged violations in connection with selection of the challenged state delegation or delegates of provisions included in, but not limited to, the Call to the Convention, National Party standards and guidelines or state laws or party rules.

(iii) If the challenging party proposes that he be seated in the state's delegation, a short and concise statement of the relief requested and the reasons therefor.

(iv) A Request for Findings of Fact in the form of distinct numbered propositions of the facts; each separate proposition shall be separately numbered.

(v) A list of witnesses that the challenging party proposes to call if a hearing is held and the address and telephone number of each such witness, if any are known at the time of filing.

(vi) A list of documents which the challenging party proposes to have considered by the Committee, if any are available at the time of filing. The list shall be accompanied by copies of all such documents of sufficient clarity to permit clear and readable reproduction by xerox or similar facsimile means.

(vii) A statement indicating whether a hearing is desired and the place which the challenging party believes would be most convenient to the parties and witnesses to have the hearing held.

(viii) The name, address, and telephone number of the challenging party's attorney of record and other representative, if any.

(d) A challenging party shall have the right reserved to him to amend any of the matters requested by Rule 2(c) above prior to the hearing with due notice to the Committee.

Rule 3 – ANSWER

(a) Within 10 calendar days of receipt of Written Notice of Intent to Challenge, each challenged party to the proceeding shall file and serve upon each other party to the proceeding, the name, address, and telephone number of his attorney of record or other representative, if any.

(b) Within 10 calendar days of receipt by the State Democratic Chairman of Notice of Intent to Challenge, the State Chairman shall file with the Committee 5 complete sets of his state's relevant laws, regulations, and rules and his state's party rules relating to selection of delegates to the Democratic National Convention.

(c) Not later than 10 days after receipt of the challenging party's Request for Findings of Fact, the challenged party shall file with the Committee:

(i) A specific answer, by paragraph, to the facts alleged by the challenging party. A separate response must be made to each fact alleged. Such answer shall state agreement with or denial of each fact alleged. Where a fact is denied, the challenged party must submit in his answer the facts the challenged party believes to be true which would substantiate the denial. Failure to so respond in good faith shall automatically deem the challenged party's alleged facts to be admitted as true.

(ii) The challenged party may submit additional facts or a counterstatement of facts provided it conforms with the form set forth in Rule 2(c)(iv) above.

(iii) A list of witnesses that the challenged party proposes to call if a hearing is held and the address and telephone number of each such witness, if any are known at the time of filing.

(iv) A list of documents the challenged party proposes to have considered by the Committee, if any are available at the time of filing. The list shall be accompanied by copies of all such documents of sufficient clarity to permit clear and readable reproduction by xerox or similar facsimile means.

(v) A statement indicating whether the challenged party desires a hearing and a designation of the place which the challenged party believes would be most convenient to the parties and witnesses to have the hearing held.

(vi) A short and concise statement of why the challenge should be dismissed and of why the challenged party should be seated.

(d) A challenged party shall have the right reserved to him to amend any of the matters required by Rule 3(c) above prior to the hearing with due notice to the Committee.

Rule 4 – HEARING OFFICER

(a) After the challenged party has filed his Answer to the challenging party's Request for Findings of Fact, the Chairman of the Credentials Committee shall appoint a Hearing Officer, who shall be responsible for finding the facts.

(b) The Hearing Officer shall be a person who is known by reputation to be fair and impartial in the context of the challenge and is experienced in the law, particularly in fact finding and procedural due process.

(c) The Chairman of the Credentials Committee shall make a reasonable effort to secure the agreement of the parties to the Hearing Officer appointed by him for the challenge.

Rule 5 – HEARINGS

(a) If any party so requests, an open and public hearing shall be held within the state at such times and places as shall be determined by the Hearing Officer. A transcript will be made of the proceedings at any such hearing. The Hearing Officer may select one or more assistant Hearing Officers to assist in conducting the hearing.

(b) The Hearing Officer shall inform the parties or their attorneys of record of the time and place where the hearing will be held.

(c) The Hearing Officer shall hear the evidence, conduct the hearing, dispose of procedural requests and similar matters, and, to the extent possible, obtain stipulations of the parties as to the facts of the challenge.

(d) Evidence

(i) If a hearing is held, each challenging party or challenged party shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Hearing Officer, may be required.

(ii) The Hearing Officer may require one or more challenging parties or challenged parties to consolidate or separate their challenges or defenses for purposes of the hearing.

Rule 6 – FINDINGS OF FACT

(a) The Hearing Officer shall make and file written Findings of Fact which shall be submitted to the parties or their attorneys of record or other representative and to the Credentials Committee in sufficient time (which in any event shall not be later than 32 days before the commencement of the Democratic National Convention), so that respective cases may be prepared for argument before the Credentials Committee.

(b) The Findings of Fact shall not include recommendations concerning the seating of delegates. This determination shall be made only by the full Committee.

Rule 7 – RECORD

The official papers, transcripts and pleadings of any proceeding under these Rules shall be maintained in the office of the Democratic National Committee in Washington, D.C., and shall be open and available for public inspection at reasonable times and for duplicating at cost to the Democratic National Committee.

Rule 8 – CONSIDERATION BY THE FULL COMMITTEE

(a) The Credentials Committee shall begin meeting not later than two weeks before the commencement of the Democratic National Convention to consider the challenges to the seating of the delegates.

(b) All meetings of the Credentials Committee shall be open to the public.

(c) Request for Consideration

Within 5 days after receipt of the Hearing Officer's Findings of Fact, the challenging party or challenged party may file written Notice of Request for Consideration by the full Committee with the Chairman. Each Notice must contain a short and concise statement of the grounds upon which the Request for Consideration is based. At such time, any challenging party or challenged party may submit to the Credentials Committee written Exceptions to the Findings of Fact and to the rulings of the Hearing Officer on procedural matters which are alleged to have prejudicial effect.

(d) Briefs

(i) Any party may file a brief to the Credentials Committee prior to 20 calendar days before the commencement of the Democratic National Convention.

(ii) Any party filing a brief shall file as many copies as there are members of the Committee plus 10 copies for the Chairman and his staff.

(e) Argument

(i) Each party shall be entitled to oral argument before the full Committee, but not exceeding 30 minutes.

(ii) The Chairman of the Credentials Committee shall notify the parties of the time for oral argument.

(iii) The Chairman of the Credentials Committee may require one or more challenging parties or challenged parties to consolidate or separate their challenges or defenses for purposes of oral argument.

(f) Decisions

(i) The Chairman shall convene the whole Committee at convenient times to decide challenges.

(ii) Committee members and a representative of the challenging party from the state in which a challenge is made may participate is such sessions but may not vote on their state's challenge.

Rule 9 – COMMITTEE REPORT

The Report of the Credentials Committee shall be prepared for public distribution and made conveniently available to all of the delegates no later than 48 hours prior to the commencement of the National Convention.

Rule 10 – MINORITY REPORT

Upon the vote of 10 percent of the members of the Credentials Committee present and voting at a meeting, a Minority Report shall be prepared for distribution to the Convention delegates as part of the Committee's Report. The Committee's staff shall assist in the preparation of such report.

Rule 11 – INTERPRETATION OF RULES AND PROVISION FOR SPECIAL PROCEDURAL RULES

(a) These Rules shall be interpreted in the interest of justice and fairness to all parties. Upon good cause shown, the Chairman or the Committee may waive any provision of the Rules in the interest of justice and fairness or to prevent undue economic hardship to any party.

(b) In the event that any of a state's delegates are selected less than 70 days prior to the convening of the Democratic National Convention, the Chairman of the Credentials Committee may provide such special procedural rules for such state – in respect of written submissions by the parties, hearings, and consideration by the full Credentials Committee – consistent with the spirit of these Rules and, to the extent practicable, with the provisions of these Rules, designed to achieve the resolution of any Credentials challenge for such state at the meeting of the full Credentials Committee held during the second week preceding the commencement of the Democratic National Convention.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 71-1018

THE STATE OF GEORGIA, et al.,

Appellants,

v.

THE NATIONAL DEMOCRATIC PARTY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF CARL L. SHIPLEY

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Washington, D.C. · THIEL PRESS · 202 · 393-0625

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF CARL L. SHIPLEY

STATEMENT OF ISSUES

1. Whether the apportionment of the Republican National Convention involves state action under the Fourteenth Amendment?

2. Whether the apportionment of the Republican National Convention presents a non-justiciable question?

3. Whether the Equal Protection Clause requires that the Republican National Convention be apportioned on the

basis of relative total population?

This case has not previously been before this Court.

STATEMENT OF THE CASE

Plaintiffs, officials and registered and qualified voters of the State of Georgia, have brought this action to compel revision of the delegate apportionment formulas for the 1972 Republican National Convention and the 1972 Democratic National Convention. They seek to have said national political conventions apportioned on the basis of one man-one vote on the ground the Fourteenth Amendment requires such action.

Motions for preliminary injunction and for summary judgment were made by Plaintiffs on June 18, 1970 (App. 62).

On July 15, 1970, Carl L. Shipley moved for summary judgment and to deny plaintiff's motion for preliminary injunction and summary judgment (App. 52). Various other Defendants moved to dismiss Plaintiffs' complaint and for summary judgment.

On November 6, 1970, the pending motions were heard. By Memorandum and Order of November 24, 1970, the Court denied Plaintiffs' motions for preliminary injunction and summary judgment and dismissed Plaintiffs' complaint.

STATEMENT OF MATERIAL FACTS

Plaintiffs are officials and registered and qualified voters of the State of Georgia. They bring suit on behalf of themselves and on behalf of all voters similarly situated.

Defendants are the National Republican and National Democratic Parties, the Republican and Democratic National Committees and the two members of each party's national committee from the District of Columbia.

Plaintiffs seek to compel the apportionment of delegates to the 1972 Republican National Convention and the 1972 Democratic National Convention on the basis of relative total population.

ARGUMENT

Carl L. Shipley approves, adopts and joins in the arguments presented in the brief of the Republican National Committee and Mrs. J. Willard Marriott, and additionally advances the propositions contained herein.

No state action is involved in the apportionment of the Republican National Convention because the several states have no control, authority or role in the apportionment of said Convention.

Apportionment of the Republican National Convention presents a non-justiciable question because there are no manageable judicial standards for determining an apportionment formula.

Since the apportionment of the Republican National Convention represents a legitimate effort to achieve lawful ends it does not offend the Equal Protection Clause which forbids only invidious discrimination.

I.

NO STATE ACTION IS INVOLVED IN THE APPORTIONMENT OF THE REPUBLICAN NATIONAL CONVENTION

Common understanding of our language and institutions indicates that the activities of a national political convention cannot be the action of a state.

Apportionment of the Republican National Convention is the "action" which is in issue. It is an activity performed by that Convention. States have no hand in it. States can-

not regulate it. The action bears no reference to the election of any state official.

Appellants seek to evade the obvious by citing cases where the activity was subject to state regulation or was part of the political process of electing state officials. *Terry v. Adams*, 345 U.S. 461 (1953), county political party; *Smith v. Allwright*, 321 U.S. 649 (1944), state convention; *Nixon v. Condon*, 286 U.S. 73 (1932) state committee; *United States v. Classic*, 313 U.S. 299 (1941), state-regulated primary. They are clearly inapposite.

Significance should also be attached to the historical context in which the cases cited by Appellants arose. All of the activities which were asserted to not constitute state action were undertaken for the sole purpose of achieving the ends which had theretofore been directly accomplished by state legislation. See, *e.g.*, *Smith v. Allwright, supra.* In the case at bar, there is no such substitution for direct state action.

The additional argument is made that apportionment constitutes state action, because states have certain authority in matters relating to the selection of delegates to the national conventions. Appellants' Brief, pages 24-27. But this argument ignores the fact that the "action" now in question is the apportionment of the national convention by itself, not the selection of individual delegates.

Only direct and immediate control and involvement in party activity constitutes state action. Thus, in *Gray v. Sanders*, 372 U.S. 368 (1968), the finding that primaries constituted state action was specifically based on the regulation and participation of the state in those primaries. State activities included supplying voting registrars, providing for election managers, enforcing party rules as to voter qualifications, and penalizing infractions, *inter alia.* See, *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946), *cert. denied*, 327 U.S. 800. Apportionment of national political conventions on the other hand, entails no regulation or participation whatsoever by the states.

II.

THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS FOR THE APPORTIONMENT OF THE REPUBLICAN NATIONAL CONVENTION

Baker v. Carr, 369 U.S. 186 (1962) established that a case is non-justiciable unless "the duty asserted can be judicially identified and its breach judicially determined, and . . . protection for the right asserted can be judicially molded" at 198.

No fixed, workable standards exist for determining to whom and to what extent and degree an obligation to be represented in a national political convention runs. This is the unavoidable consequence of the fact that the Republican National Convention must be a reflection of Republicans, Republican sentiment and Republican support.

Examination of the problem of even identifying what constitutes a "Republican", without reaching the effect of other relevant factors, gives an inkling of why no manageable judicial standards exist. Who is a "Republican"? One who is registered as such? One who is registered otherwise but votes Republican? One who votes for 60% of the Republican candidates? Forty percent? One who votes Republican nationally and Democrat locally? One who votes for Republican senators and congressman but not presidential candidates? Vice versa? Etc., *ad infinitum.*

On the matter of ascertaining who are "Republicans", it is instructive that the Supreme Court has steadfastly refused to attempt to identify what constitutes a "republican" form of government. *Pacific States Telephone and Telegraph v. Oregon*, 223 U.S. 118 (1912); *Davis v. Ohio*, 241 U.S. 565 (1916); *Ohio v. Akron Park District*, 281 U.S. 74 (1930).

Analysis reveals that the authorities cited by Appellants do not support the assertion that a justiciable question is presented by the instant case. The legislative apportionment issues were justiciable because they were bottomed upon an identifiable foundation, the citizen.

> "With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds v. Sims,* 377 U.S. 553, 565 (1964).

As outlined hereinabove, there is no such foundation with respect to the apportionment of a national political convention. Therefore, neither duty, breach nor remedy is ascertainable, and the question is non-justiciable.

III.

THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT ARE MET BY THE PRESENT REPUBLICAN NATIONAL CONVENTION APPORTIONMENT SYSTEM

Only invidious discrimination which reflects no legitimate or rational policy offends the Equal Protection Clause. *Baker v. Carr, supra.* This does not require that a Court agree with a policy, or even think it wise. It is enough that it is not totally arbitrary and capricious and devoid of reason. *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955).

Politics is undeniably an art, and the apportionment of the Republican National Convention is a reasonable effort in that field. It is a rational endeavor to provide a representative reflection of the party and its strength and to select an appropriate candidate, *inter alia.* That is beyond question, and that is all that is required.

Requiring the apportionment of national political conventions on the basis of relative total population would be to turn the Equal Protection Clause against itself. For no reason, Republicans in largely Democratic states would be given a disproportionate voice in their party's affairs. An irrational inequality would result, since a state's population *per se* is not related to a political party's strength in that state.

The Fourteenth Amendment's guarantees against invidious discrimination and arbitrary action forbid only those measures which have no rational relation to a lawful purpose.

Nebbia v. New York, 291 U.S. 502 (1934). The apportionment of the Republican National Convention is a rational effort in an area where no definitive formulations are possible. Moreover, Appellants have in no way demonstrated the invidious discrimination which must be shown to support their case. *Dusch v. Davis,* 387 U.S. 112 (1967).

Smith v. State Executive Committee of the Democratic Party of the State of Georgia, 288 F. Supp. 371 (N.D. Ga. 1968) and *Irish v. Farm Labor Party of Minnesota,* 287 F. Supp. 794 (D. Minn. 1968), *affirmed* 339 F.2d 119, are clear authority that the Equal Protection Clause does not require application of the one man-one vote doctrine to party affairs above the first level of selection. The former case dealt with the selection of the membership of a party state central committee, the latter with the apportionment of a state party convention. Each refused to require application of the one man-one vote principle.

Maxey v. Washington State Democratic Committee, 319 F. Supp. 673 (W.D. Wash. 1970), which applied the one man-one vote principle to the apportionment of delegates to Washington's state political conventions, is essentially different from the issue at bar, since it was predicated upon a state commitment to popular elections in the context of a state-created election process. The basis of the ruling was made clear by the court's statement "Once the state has undertaken to provide for popular election, all votes must be equally valued" at 679.

The distinctive nature of the *Maxey* decision is further illuminated by the holding of the same court in a companion case that no state commitment to the popular election of the membership of state political committees existed, and that the one man-one vote principle need not be applied to selection of committee members. *Dahl v. The Republican State Committee,* 319 F. Supp. 682 (W.D. Wash. 1970).

Therefore, upon reason and authority, the present apportionment of the Republican National Convention does not violate the Fourteenth Amendment.

CONCLUSION

For the reasons above stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1018

THE STATE OF GEORGIA, et al.,
Appellants,

—VS—

THE NATIONAL DEMOCRATIC PARTY, et al.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND MRS. J. WILLARD MARRIOTT

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---

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND MRS. J. WILLARD MARRIOTT

STATEMENT OF ISSUES

1. Was the 1968 Republican National Convention required to allocate delegates to the 1972 Republican National Convention among the various states on the basis of population?

2. Was the Court below correct in holding that there are no "judicially discoverable and manageable standards" by which to frame appropriate relief?

3. Was the Court below correct in granting Defendants' Motions to Dismiss and in denying Plaintiffs' prayers for Injunctive Relief and Declaratory Judgment?

4. Was the Court below correct in quashing service of process on the National Republican Party?

This case has not previously been before this Court.

STATEMENT OF THE CASE

This is an action brought by the Plaintiffs as registered and qualified voters of the State of Georgia seeking to compel the reapportionment of delegates to the 1972 Democratic National Convention and the 1972 Republican National Convention on the basis of one man—one vote.

On June 18, 1970 the Plaintiffs moved for preliminary injunction and for summary judgment (App. 34). On July 15, 1970 the Republican National Committee and Mrs. J. Willard Marriott moved to dismiss this action on the ground that the complaint failed to state a claim upon which relief could be granted (App. 40).

On August 3, 1970, the Republican National Committee and Mrs. Marriott moved to quash the service of process on the National Republican Party (App. 58).

A hearing on all pending motions was held on November 6, 1970 and the Court's "Memorandum and Order" was issued on November 24, 1970 granting the Defendants' Motions to Dismiss and to Quash, and denying Plaintiffs' Motions for Preliminary Injunction and for Summary Judgment (App. 62).

STATEMENT OF MATERIAL FACTS

This is an action brought by the Plaintiffs purportedly pursuant to the provisions of 28 U.S.C., Sections 1343(3), 1343(3) and 2201, and 42 U.S.C., Sections 1983, 1985(2), 1985(3) and 1988. The Plaintiffs allege that they are registered and qualified voters of the State of Georgia and purport to present this matter as a class action on behalf of all

voters similarly situated against the National Republican and National Democratic Parties, the Republican and Democratic National Committees and the two District of Columbia members of each national committee. The Plaintiffs are seeking to require that delegates to the 1972 Republican National Convention and the 1972 Democratic National Convention be apportioned among the various states on the basis of total population. Plaintiffs urge that this action is required by the Fourteenth Amendment of the United States Constitution.

ARGUMENT

INTRODUCTION

The Republican National Committee contends, first, that the one man—one vote principle is inapplicable to delegate allocation for a national political convention.

Second, the Republican National Committee contends that allocation of delegates on the basis of total population rather than on party strength in each state is totally inappropriate and would result in substantial inequity and discrimination at the 1972 Republican National Convention which would have no justifiable basis.

Finally, the Republican National Committee contends that *Baker v. Carr*, 369 U.S. 186, 7 L.Ed. 2d 663 (1962) which, by its terms is applicable only to discriminations which are arbitrary and capricious and reflect no legitimate policy, does not prohibit the selection of delegates for the 1972 Republican National Convention in accordance with delegate formulation adopted by the 1968 Republican National Convention and which is shaped to reach legitimate Republican goals.

I.
THE ONE MAN—ONE VOTE REQUIREMENT IS NOT APPLICABLE TO POLITICAL CONVENTIONS

The delegate selection process involves two stages. At the 1968 Republican National Convention the elected delegates decided how many delegates each state, the District of

Columbia, Puerto Rico and the Virgin Islands would be entitled to have at the 1972 Republican National Convention. See Rule 30, 1968 Republican National Convention, (Exhibit A to the Plaintiffs' Requests for Admissions) (R. 38 No. 8, See also R 65, Tr. 88-89).

A complete copy of the Rules adopted at the 1968 Republican National Convention are submitted herewith marked "Exhibit A."

These same delegates also created the Republican National Committee to serve for four years. This Committee is solely a creation of the convention and is in existence only from convention to convention. If the delegates to any particular Republican National Convention should so decide, the Republican National Committee would cease to exist.

The role of the Republican National Convention in the delegate selection process ends upon the adjournment of the Convention.

Thereafter each state determines how its allocated number of positions will be filled. Various methods are employed to choose the individual delegates from each state, but essentially this is done either by state primary, by state political convention, or by appointment by some state political committee.

The delegates so chosen are each entitled to one vote at the 1972 National Convention, where the Republican presidential nominee will be chosen.

The Plaintiffs seek to have this case treated as a reapportionment case. They urge this court to find, in line with the numerous legislative reapportionment cases, that delegates to the Republican National Convention must be apportioned among the states on a strict population basis. The Plaintiffs have tried to place this case in a posture in which the Court will conclude that the states control the 1972 Republican National Convention and that therefore courts are authorized to intervene and reapportion the delegates for the 1972 Republican National Convention. In doing so, the Plaintiffs have failed to consider the cases which, considering this issue, have denied the applicability of the one man—one vote principle to political conventions. They have disregarded the limitations placed on the application of this principle by recent decisions of the United States Supreme Court.

The facts in this case do not involve, as they did in *Evans v. Newton*, 382 U.S. 296, 15 L.Ed. 2d 373 (1966), the delegation by a state of an aspect of the elective process to private groups. Thus the question of malapportionment and reapportionment is never reached because, unlike the matters presented to the Court in *Baker v. Carr*, 369 U.S. 186, 7 L.Ed. 2d 663 (1962) and *Wesberry v. Sanders*, 376 U.S. 1, 11 L.Ed. 2d 481 (1964), the instant matter involves a private political controversy which does not "arise under" the Federal Constitution.

There is thus no subject matter jurisdiction in this Court. Additionally the matter is nonjusticiable. See *Baker v. Carr, supra.*

The present case does not involve any question of discrimination or malapportionment in primary elections, such as were involved in *Terry v. Adams*, 345 U.S. 461, 97 L.Ed. 1152 (1953), *Nixon v. Hendron*, 273 U.S. 536, 71 L.Ed. 759 (1927), and *Nixon v. Condon*, 286 U.S. 73, 76 L.Ed. 984 (1932).

In *Gray v. Sanders*, 372 U.S. 368, 9 L.Ed. 2d 821 (1963), which involved the State of Georgia's county unit system in Democratic primary elections, the Court held that the actions of the Democratic party in giving disproportionate value to votes in a primary election violated the Fourteenth Amendment. The Court stated, however, that:

> We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system. 372 U.S. at 378, fn. 10.

This question which *Gray v. Sanders* left undecided was considered and answered in *Irish v. Democratic Farmer Labor Party of Minnesota*, 287 F.Supp. 794 (D. Minn. 1968), aff'd per curiam, 399 F.2d 119 (8th Cir. 1968). The question presented, as framed by the Court, was whether "the 'one man–one vote' principle fathered by *Baker v. Carr, supra*, decided on the basis of the equal protection clause of the Fourteenth Amendment of the United States Constitution is applicable to a Minnesota state political party convention. . ."

Defendant's constitution provided that precinct delegates would be elected at precinct caucuses, at which every person attending would be entitled to vote.

The precinct delegates then became the delegates to the county convention, which chose delegates to the state convention.

The constitution also provided that in the county convention:

> It shall be the duty of the County Conventions to elect one delegate to the State Convention with one vote for each 1,000 votes cast in that county for the leading statewide Democratic-Farmer-Labor candidate or national Democratic candidate at the last general election or last presidential election, whichever is greater, provided however, that each county shall be allowed at least six votes.

It was this method of apportionment of delegate votes that the Plaintiff sought to be declared void.

The Court stated the issue as follows (287 F.Supp. 801):

> The issue before the court is in reality whether a court should interfere with the internal workings and management of a political party, particularly in a case such as this where it is not denied that at the 'grass roots' level, i.e., the precinct caucuses, the 'one man—one vote' principle was and has been complied with. The malapportionment, if such it be, is a result of the execution of the constitution of the DFL as a political party, not the by-product or result of any state statutes or state constitutional provision.

The court further stated that if there were a requirement of one man—one vote, this had been satisfied by according every Democratic voter a chance to vote at the precinct caucus level, and that political party conventions involved political questions "not to be interfered with by the Courts."

In affirming this decision, the Court of Appeals, in a per curiam opinion, stated that there was

> nothing of constitutional significance in the alleged malapportionment here above the precinct caucus level. What was done at the precinct level was in full accord with the one man—one vote principle. What took place thereafter was not the product of malapportionment among the people of the electorate. See *Sailors v. Board of Educ.*, 387 U.S. 105, particularly footnote 6 on p. 109, 87 S.Ct. 1549, 18 L.Ed. 2d 650 (1967); *Fortson v. Morris*, 385 U.S. 230, 87 S.Ct. 446, 17 L.Ed. 2d 330 (1966).

> Any element of malapportionment which may exist has come about by action of the properly elected precinct delegates to the county conventions and by action in the party structure after the county conventions. We do not extend the one man–one vote principle beyond the popular electorate and to decisions of those so properly elected; at least, we do not do so upon the facts present in this case. Any such action taken by a court would, we conclude, improperly interfere with the exercise of power vested in the elected county convention delegates. This is no less true with respect to a political party structure than it is with other elected officials.

In *Irish* the District Court noted that substantially all of the cases where the one man–one vote principle has been applied have involved "the election of legislators or those exercising a legislative function," citing *Fortson v. Morris*, 385 U.S. 230, 17 L.Ed. 2d 330 (1966) and *Sailors v. Board of Education*, 387 U.S. 105, 18 L.Ed. 2d 650 (1967), in both of which cases the Supreme Court refused to extend the principle further. The Court stated that there was no justiciable controversy because what was involved was a private, intra-party dispute — a purely political question. "The party should be allowed to manage its own affairs so long as it complies with precinct caucus requirements." 287 F.Supp. at 805.

The next case which involved the application of the one man–one vote rule to political party conventions was *Smith v. State Executive Committee of Democratic Party of Georgia*, 288 F.Supp. 371 (N.D. Ga. 1968). Here again the issue was "whether the equal protection clause and its 'one man, one vote' sequel applies to the affairs of political parties and, if so, to what extent." (288 F.Supp. 374)

The method of selecting members to the central state committee under attack was the election of one-half the members by popular election by popularly elected county committee members, and the apportionment of one-half the members by the Party Chairman. In stating that this was a political question with which the court should not become involved, the Court concluded that even if there were jurisdiction, the equal protection requirements were met by according each vote equal weight at the lower levels of selection.

The Plaintiffs here have not attacked the method of delegate selection within the

individual states, but rather object to the fact that at the national convention one delegate may, they allege, represent fewer or more persons than some other delegate. No question has been raised as to the propriety of the selection process within the individual states. No claim has been made and no evidence presented to establish that persons elected at the first level of political elections in the states are not elected on a one man--one vote basis. So too at the second level of selection, i.e., the nomination of a candidate for president, the vote of each delegate at the Republican Convention has equal force. This is all that is constitutionally required.

Irish and *Smith* involved factual situations strikingly similar to this case. In *Irish* the Plaintiffs were complaining that in the county convention the number of votes allocated to each county was not consistent with the population in the several counties. Here the Plaintiffs are complaining that the number of votes allocated to each state is not consistent with the population of the various states. In both instances the allocation formula is based on the voting record of the voters in the political unit involved. Similarly, in *Smith* the plaintiffs were seeking to establish a right of more equal representation in the process of the selection of a presidential candidate.

In the most recent decision of the United States Supreme Court dealing with this issue, it was held that the application of the one man—one vote principle is limited to the situation where "a state or local government decides to select persons by popular election to perform governmental functions." *Hadley v. Junior College District*, 397 U.S. 50 (1970). Both *Irish* and *Smith* held that delegates are not government officials, but even if it is conceded that delegates do perform governmental functions, any requirement of one man—one vote which may exist, exists only at the first level of selection within each state, since it is only at this level that the method of selection is subject to state control. The Republican National Committee has no control over or connection with this selection process.

The selection of a candidate by the delegates at the Republican National Convention does not involve any decision by a state or local government, does not involve the selection of a person to perform governmental functions, and is clearly not done by popular election.

In *Fortson v. Morris*, 385 U.S. 231, 17 L.Ed. 2d 230 (1966) the court held that before the one man—one vote principle is applicable, there must be a showing of a commitment to popular election as the exclusive means of selecting the official. It may well be that the initial selection of delegates, at least in the states where they are chosen by primary election, involves a commitment to popular election, but by no means is the selection of a candidate at the national convention, where the method of selection is wholly within the discretion of and determined by delegates to the last convention, committed to popular selection.

It was on this basis of state control over the selection process that the Court in *Maxey v. Washington State Democratic Committee*, 319 F.Supp. 673 (W.D. Wash. 1970), held that the one man—one vote principle is applicable to the apportionment of delegates to state political conventions. In a companion case, *Dahl v. The Republican State Committee*, 319 F.Supp. 682 (W.D. Wash. 1970), the same court found that there was no commitment to popular election of members of state political committees, and held the one man—one vote principle inapplicable to the selection of such members.

Maxey is inconsistent with *Irish* and *Smith* in that a necessary implication of its holding is that delegates perform governmental functions, and to this extent we believe *Maxey* is wrong. However, *Maxey* does limit itself to the confines of the opinion of the Supreme Court in *Hadley* and requires a showing of a decision by the state to select these delegates by popular election.

Although the holding in *Maxey*, if followed, might require the popular election of delegates within each state, the holding should not be extended to require the popular selection of a presidential candidate, which is the sole issue in the present case. As previously stated, the method of selection of the presidential candidate at the Republican National Convention is determined by the delegates to the preceding convention, and this determination is not made pursuant to any grant of authority from any state or other governmental unit.

Furthermore, were this Court to invalidate the Republican National Committee allocation formula, there would be no one authorized to create a new formula. The present

formula was voted by the 1968 Republican National Convention. The Republican National Committee has only the authority granted to it by the rules adopted by the 1968 Republican National Convention, and has no authority to change this formula. The 1968 convention has adjourned and the delegates to that convention no longer have power or the means to adopt an allocation formula.

In *Dahl*, the Court stated as one of its reasons for refusing to upset the method of selection of committee members, that to do so would leave the political party organization without any governing body which could reorganize the party. Similarly, in the present case, if the allocation formula is set aside, there is no individual or organization authorized to issue a call for delegates on a new basis. As in *Dahl*, such a ruling would require a complete reorganization of the national Republican organization, and such a fundamental change should not be undertaken by the court, but rather, by the organization or perhaps by Congress, if Congress in fact has jurisdiction to act.

II.

THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS BY WHICH TO FRAME APPROPRIATE RELIEF

The Plaintiffs rely heavily on *Baker v. Carr*, in urging that the one man–one vote principle be applied to the national nominating convention. That case involved a legislative reapportionment, and in relying on that case the Plaintiffs conveniently either fail to see or choose to ignore the essential differences in the functions performed by a legislative body on one hand, and a political nominating convention on the other. It is precisely these differences which take this case out of the realm of *Baker v. Carr*, and the numerous legislative reapportionment cases which followed, and cause this controversy to be one of which the court should not take judicial cognizance.

Unlike a legislative body, the function of the national convention is not to represent equally all persons within a given geographic area. The individual delegates to the national convention are chosen by other Republicans, whether it be by primary election or state party convention, and it is only these Republicans, and not the entire populace who are

represented at the convention. Furthermore, the function of the delegates to the convention is not to simply register the desires of their constituencies, but rather to engage in a truly deliberative process. The function of the convention is to put forth a particular political philosophy and to choose a candidate for president who will espouse this philosophy and give it the force of law. In choosing this candidate, it cannot seriously be contended that the Republican National Convention or the delegates to the national convention should be sensitive to the wishes of all persons in every state on an equal basis. Quite clearly, the delegates to the convention, in choosing a candidate, are acting in a manner which in fact they hope will be adverse to the interests of a great many persons from the particular state they represent. To say that these people should be equally represented at the convention misses entirely the purpose and function of a national political convention.

It is difficult, or perhaps impossible, to specify accurately who the delegates to the national convention really represent. They might be said to represent the Republicans within any particular state who did, or were entitled to, participate in the initial delegate selection process. Typically, this would be the registered Republicans within the State. On the other hand, it could be equally well argued that the delegates to the national convention represent only those Republicans who actively participate in party affairs and resolutely support the party's candidate and its philosophy. At the other extreme, it could be said that the delegates do not represent people from any particular state, but rather have a national constituency as will the candidate they choose in the event he is elected.

The only thing that can be said with certainty is that the delegates do not, and are not intended to, equally represent all of the people. There is no clear standard by which this representation can be measured, and it is for this reason that the decision as to whom the delegates represent and how they are to be allocated is best left for decision at the national convention. This is done in a way in which the convention delegates feel will convince the general electorate of the superiority of the Republican candidates and philosophy. This is the function of the Republican National Committee, and the means necessary to attain this objective are continuously changing and undergoing study. There are no set standards that can be consistently applied.

Baker v. Carr, the case relied on by the Plaintiffs to sustain their position that a justiciable controversy is here presented, recognizes that situations may arise where there are no judicially manageable standards and which therefore are outside the realm of activities with which the courts will interfere.

The language quoted by the Plaintiffs at page 15 of their brief is particularly apt:

> In the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.

To say, as the Plaintiffs have, that the duty has been judicially identified, that its breach has been judicially determined, and that a remedy can be judicially molded, all on the basis of one man–one vote, begs the question. It does not stand up under analysis.

What is the duty? Clearly there is no duty on the Republican National Convention to represent all persons equally. If each state were to have a number of delegates based on the state's population, the states with low Republican population would be over-represented and the state with a high Republican population would be under-represented. Clearly, delegates must be allocated on some basis of party strength, as is in fact done. The problem, of course, is in defining the appropriate measure of party strength. Party registration within a state is not an appropriate measure. Local party affiliation often has little or no relevance to national issues. Furthermore, a number of states have no provision for party registration. Allocation strictly on the basis of votes cast in a prior election is inappropriate, since this depends so much on a variety of factors which are continuously changing, such as weather, voter turnout, relative strength of candidates for local office and the personalities involved, to name a few.

In sum, there is no single standard which can be consistently applied. All the factors must be considered and given appropriate weight. For a court to make this decision would require it to make a policy determination as to which factors are more important in fostering and preserving the legitimate political goals of the Republican Party. This is an area which the Supreme Court has steadfastly avoided.

It is only through the political process that this duty can be defined and met, and given the functions and purposes of the political parties, it is an ever changing one, best left to the convention delegates themselves to define consistently with the changing needs of the political process. And until this duty can be defined, its breach certainly cannot be determined, nor can a remedy be molded.

III.
THE CURRENT SYSTEM MEETS WHATEVER FOURTEENTH AMENDMENT STANDARDS MIGHT BE APPLICABLE

Furthermore, as stated in *Baker v. Carr*, it is only those discriminations which are arbitrary and capricious and which reflect no legitimate policy which are prohibited by the Fourteenth Amendment. The allocation formula adopted at the Republican National Convention and applicable for the 1972 Republican National Convention is employed to further its legitimate and historical goals and purposes, so even if this were a case where state action and judicially manageable standards could be found, there is no violation of any right guaranteed by the Fourteenth Amendment which needs to be corrected.

Plaintiffs seek reversal of the District Court's opinion on the ground that it failed to "articulate acceptable reasons for the variations among the population of the states," relying on *Swann v. Adams*, 385 U.S. 440, 17 L.Ed. 2d 50 (1969). This case does not support Plaintiffs' position. *Swann* was a legislative reapportionment case in which the Court found there were "judicially discoverable and manageable standards" by which to frame appropriate relief. It is only when such standards are first established that the relief can be measured against such standards. The Court in *Swann* held that the plan approved by the District Court did not measure up against such standards, and reversed the District Court because it had failed to articulate any reasons for the variation from the standard and because the state had not presented any reasons therefor..

In the present case, the court has found there are no judicially manageable standards, so there is no reason to explain why there were variations from the standard urged by the Plaintiffs. Furthermore, both the Democratic National Committee and the Republican

National Committee, in their briefs and at oral argument, below, set forth valid reasons and policies for the variations among the states, and these clearly show that the allocation formulas in use serve legitimate purposes and are not arbitrary or capricious, nor violative of any right guaranteed by the Fourteenth Amendment. Even if judicially manageable standards could be found, the formula adopted by the Republican National Convention would not violate any rights guaranteed by the Fourteenth Amendment.

The Plaintiffs ask this Court to strike down the delegate formula enacted by the 1968 Republican National Convention. There is no state action involved in the development and adoption of this formula. The formula was voted by the delegates to the 1968 Republican National Convention who came together to strengthen the party of their choice and to support the political party which they believed best for this country.

What is the formula so adopted and here challenged?

First as to District Delegates: These delegates are allocated to Congressional Districts and thus are in fact allocated on a population basis.

1. One (1) District Delegate from each Congressional District casting four thousand (4,000) votes or more for the Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.

2. One (1) additional District Delegate for each Congressional District casting twelve thousand five hundred (12,500) votes or more for the Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election. (See copy of Rules adopted at the 1968 Republican National Convention, Exhibit A, attached hereto.)

The District delegates will comprise two-thirds of all delegates in attendance at the 1972 Republican National Convention.

As the next step in the formula, recognizing the manner in which votes in the Electoral College are allocated and recognizing that each state has two members of the U.S.

Senate, every state is given four delegates at large to be elected at large and not by Congressional Districts.

In addition, six additional delegates at large are allocated to each state which casts its electoral vote for the Republican nominee for President in 1968. If a state did not cast its electoral vote for the Republican nominee in 1968 but in 1968 or in any subsequent election held prior to the 1972 Republican National Convention elects a Republican U.S. Senator or a Republican governor or a Republican majority of the state's membership in the U.S. House of Representatives, then such state will be entitled to the six additional delegates.

Five delegates at large were given to Puerto Rico, three delegates at large to the Virgin Islands and three delegates at large to Guam.

In 1972 at least forty-two states will receive the six bonus votes.

This formula has evolved over many years. It was forged in the hot and meaningful fire of politics. Its formulation recognized objections of the North registered in the 1930's and 1940's that the South then had too great a weight in Republican conventions. Southern delegates in these years were voting in Republican National Conventions on a basis of relative equality with delegates from the Northern states. In some instances Southern delegates would return home, and their states would not place a single Republican candidate on the November ballot.

Much of this has now changed. As changes have occurred, bonus delegates have gone to the South as well as the North.

Adjustments were made from time to time in the formula by the delegates who, voting as Republicans at a Republican convention, acted to assure that the majority voice in the selection of party candidates and in the writing of party platforms would be given to those states whose voters had given strong support to the Republican cause in previous elections. The Republican Party does not require its candidates and delegates to sign a pledge that they will support the nominee of the Republican National Convention for President. Nevertheless, it is expected that delegates who participate in the selection of a President will support the candidate nominated by the convention.

The Republican Party should not be required to give delegate strength to states in which a large percentage of the voters support the Democratic cause and who would like to weaken the Republican Party by assisting in the choice of a Republican nominee who might be easy for the Democrats to defeat.

In 1968 the State of Alabama voted overwhelmingly for Wallace for President. At the 1972 Republican National Convention, Alabama should not be given the same delegate strength as is given to a state having the same population but which gave strong support to the Republican cause in 1968 and 1970. The Republican National Convention should be composed of delegates who represent the workers in the Republican cause, those who support the nominees of the Party and those who have some understanding of the political issues and what the Republican Party seeks to accomplish.

To apportion the delegates to the 1972 Republican National Convention solely on population, would ignore entirely the purpose and function of the 1972 Convention. It is intended to be and should be a meeting of Republicans representing the Republicans in their home states and not representing groups of people who desire the downfall of the Republican cause.

There is no law in the country at the present time and no court decision which would prevent the organization of a political party made up of people over 65 years of age. Delegates to the national convention of that party would quite properly be over 65 years of age. They would be representing the people over 65 years of age in their home states—not the general population. If two states had an equal number of residents, but one state had 25 percent more people over 65 years of age than the other, the state with the larger number of 65 year olds would be entitled to more delegates and more representation at the convention of the party for those over 65.

A decision of this Court substituting this Court's judgment for that of the political parties as to the delegate make-up of conventions would prevent the organization of parties organized for the elderly or for any other special group. It would make it difficult, if not impossible, to create new political parties.

The Republican Party is fully aware that if it is to win elections, it must have delegate allocations recognized as fair by the voters of the country. Allocating delegates in 1972 based on population alone would mean that the delegates from the nine largest states: that is, New York, Pennsylvania, Illinois, Ohio, Texas, California, Michigan, New Jersey and Florida would have complete and absolute control of both national political conventions. The small states would receive two or three delegates as the result of allocation by population. They would have such limited participation in the convention that very shortly our national political parties would not exist. They would become the political parties of the large states.

A national political convention is held not only to select candidates to head the ticket, but to bring together for the purpose of writing the platform and of planning strategy, representatives from every section of the country, representatives of all interests in the country: city interests and farm interests; labor interests and management interests.

The record does not establish that the State of Georgia will be injured or that the people of The State of Georgia or The Republican Party of Georgia will be injured by the formula that will govern the 1972 Republican National Convention.

There is no evidence as to what would happen to Georgia's representative if a population formula was adopted. Such a formula would turn the control of the Convention over to nine states. Georgia would not be one of these.

If this Court takes jurisdiction in this case, it will go further than any Court has gone up to the present time.

There is no state action involved.

There is no statute involved here. There is no Federal act involved.

This Court, to take jurisdiction, will have to decide that because there might be state action involved in the selection of delegates to the various state conventions, at which some delegates to the National Convention would be elected or some state action involved in choosing electors, that the Court is given authority to control every preliminary step taken

by a political party in designating its choice for President. In every prior case, the Courts have found it necessary to find some state action because the Fourteenth Amendment applies to state action and not an action by a group of people of one mind who join together because they feel that they thereby gain strength to accomplish purposes which they want.

IV.
THE DISTRICT COURT WAS CORRECT IN QUASHING SERVICE ON "THE NATIONAL REPUBLICAN PARTY"

There is no known organization, incorporated or unincorporated, with the title "The National Republican Party."

On the record in this case the Judge of the District Court was correct in quashing service because there is no "The National Republican Party" which could have been served, which could have appeared or which could respond to orders of this Court. The Judge was also correct because no service was made which, in accordance with the provisions of the applicable statute and the rules of this Court, constituted service on "an officer, a managing or general agent, or on any other agent authorized by appointment or by law to receive service of process."

There are Republican party organizations in all 50 states of the United States and in Puerto Rico, Guam and the Virgin Islands. Each state organization is a separate and independent entity. They are not subject to the direction, orders or control of any national organization.

The Republican Party in each state determines the men and women who will be the candidates of that party in that state. At times the Republican standard bearer in one state will be at odds and in disagreement with Republican leaders on a national level or in another state. Such disagreement does not affect the party standing of the individual concerned in his own state and with his own organization.

The various Republican state organizations are brought together in a loose confederation at the time of the meeting of the Republican National Convention. Such conventions

are held each year in which a presidential election takes place.

When the Republican National Convention is in session, it can be said that that organization speaks and acts for the Republican Party. The Republican National Convention adopts a platform which it submits to the voters of the country in order that such voters may decide to support or not support the principles set forth therein. The Republican National Convention nominates the Republican candidates for president and vice president. For at least 100 years the Republican National Convention has at each convention voted to create a Republican National Committee to serve until the next meeting of the Republican National Convention. The rules for this Committee are adopted by the Republican National Convention. The Republican National Committee has no authority to change or amend the rules. The Republican National Committee has no authority over and beyond that granted to it by the Republican National Convention.

Once a Republican National Convention has adjourned, the only national Republican organization in existence is the Republican National Committee. There is no corporation known as "The National Republican Party." There is no unincorporated association known as "The National Republican Party."

In his argument in the District Court, counsel for the Plaintiffs contended that all individuals in the United States claiming to be Republicans are members of an unincorporated association. There is no legal support for this assertion. When one speaks of the Republicans in the United States, one refers to the millions of people who vote Republican and who speak and work for the Republican cause. This does not make them members of an unincorporated association. When one speaks of the veterans of America, one speaks of all of those who served in the Armed Forces. They are not an unincorporated association. When one speaks of the farmers of America, one speaks of all farmers but their common interest in farming does not make them members of an unincorporated association.

At page 33 of their brief, counsel for the Plaintiffs have cited cases to support the proposition "that political parties are unincorporated associations." Examination of their case indicates, however, that in each instance, the court was concerned with an action

brought against a political committee; in one instance, a county committee, in another instance a state committee and in another instance a Democratic organization. We agree that organized political committees are unincorporated associations within the meaning of Rule 17(b) F.R.C.P. We agree further that unincorporated associations may be sued in the District of Columbia.

None of the cases, however, is authority for the proposal that all supporters of the Republican Party in the United States have in some fashion become members of an unincorporated association and subject as a result thereof to all obligations and liabilities which the law requires members of an unincorporated association to assume.

The one federal case cited by the Plaintiffs on this point is *Yonce vs. Miners Memorial Hospital Association*, 161 F.Supp. 171 (W.D. Va. 1958), (Plaintiffs Brief page 30). In that case, the court stated, immediately after the passage quoted by Plaintiffs:

> "The word 'association' as here used refers to associations such as trade unions, fraternal organizations, business organizations, and the like."

No counsel has appeared in this case for the National Republican Party because there are no officers or members of the National Republican Party who could employ counsel. No answer has been filed in this case by the National Republican Party because no one exists with authority to authorize the filing of such an answer. There is no one on whom the process of this Court might be served as a representative of the National Republican Party.

The situation relative to the attempt to serve the National Republican Party is the same as attempting to, serve the farmers of America by making service on a farmer, or the union members of America by making service on a single union member, or all Americans over 65 years of age by serving on one individual who is more than 65 years of age.

The question raised here goes beyond technicalities. The motion to quash asked the court to clear the record and docket in this case of a meaningless name which describes no known organized group. It is a fact, however, that there is no record in this case which establishes that service has been made on the National Republican Party.

The Plaintiffs argue that service was accomplished on the National Republic Party because service was made on Miss Good as an agent of Republic National Committee (App. 60, 61).

Returns published at pages 31 and 32 of the Appendix purport to be the returns of service on "The Republican National Committee" and "National Republican Party." It is of interest to note, however, that both report service on Miss Jo Good at approximately the same time on March 30, 1970 and that on the return purporting to show service on the National Republican Party are written the words "served in duplicate."

It is obvious from these documents that a Deputy Marshall came to the Headquarters of the Republican National Committee, left two copies of the Plaintiffs' complaint with Miss Good who is an employee of the Republican National Committee and then made the returns of service shown in the Appendix (App. 31, 32).

There is, however, an uncontroverted affidavit on file in this case (App. 60) to the effect that Miss Good neither before nor after March 30, 1970 was an officer, managing or general agent, an employee of or authorized by appointment or by law to receive service of process on behalf of the National Republican Committee.

The lack of proper service on the Republican National Committee has been cured by the appearance in this case of the Republican National Committee. The lack of service on the National Republican Party has not been cured by any appearance made in this case or by any other act performed by one authorized by the "National Republican Party." There is no way to cure defective service on an organization which has no legal existence.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed in all respects.

Respectfully submitted,

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FRED C. SCRIBNER, JR.

Attorneys for Republican National Committee and Mrs. J. Willard Marriott

EXHIBIT A

RULES

Adopted by

REPUBLICAN NATIONAL CONVENTION

Held at Miami Beach, Florida
August 5, 1968

ISSUED BY

REPUBLICAN NATIONAL COMMITTEE

WASHINGTON, D. C.

Rules Adopted by the
REPUBLICAN NATIONAL CONVENTION
Held at Miami Beach, Florida
August 5, 1968

RESOLVED, *That the following be adopted as the rules of business of this Convention; the rules for the election and government of the National Committee; and the rules under which Delegates and Alternate Delegates shall be allotted to the respective States, the District of Columbia, Puerto Rico, the Virgin Islands and Guam, in the next Convention, how their election shall be conducted and contests shall be considered. Whenever used in the rules, "State" or "States" shall be taken to include the District of Columbia, Puerto Rico, the Virgin Islands and Guam, unless the context in which the word "State" or "States" is used clearly makes such inclusion inappropriate.*

PROCEEDINGS IN THE CONVENTION

RULE NO. 1

The Convention shall proceed in the order of business prepared and printed by the Republican National Committee.

RULE NO. 2

No person, except members of the several Delegations and Officers of the Convention, shall be admitted to the section of the Convention Hall apportioned to Delegates.

RULE NO. 3

When the Convention shall have assembled and the Committee on Credentials shall have been appointed, the Secretary of the National Committee shall deliver to the said Committee on Credentials all credentials and other papers forwarded under Rule No. 34.

RULE NO. 4

No person on the temporary roll of the Convention and whose right to be seated as a Delegate or Alternate is being contested (except those placed on the temporary roll by affirmative vote of at least two-thirds (2/3rds) of the members of the National Committee), shall be entitled to vote in the Convention or in any Committee thereof until by vote of the Convention the contest as to such person has been finally decided and such person has been permanently seated.

RULE NO. 5

In the absence of any Delegate at Large, or Delegate from any Congressional District, the roll of Alternates for the State or District shall be called in the order in which the names are placed upon the roll of the Convention, unless the State or District Convention or the law of the State or

District electing the absent Delegate shall otherwise direct, in which event the Alternates from the State or District shall vote in the order established by the State or District Convention or the law of the State.

RULE NO. 6

Each Delegate in the Convention shall be entitled to one (1) vote, which may be cast by his Alternate in the absence of the Delegate.

RULE NO. 7

The Rules of the House of Representatives of the United States shall be the Rules of this Convention, so far as they are applicable and not inconsistent with the Rules herein set forth provided, however, the Convention may make its own rules concerning the reading of Committee reports and resolutions.

RULE NO. 8

When the previous question shall be demanded by a majority of the Delegates from any State, and the demand is likewise seconded by two (2) or more States, and the call is sustained by a majority of the Delegates of the Convention, the question shall then be proceeded with and disposed of according to the Rules of the House of Representatives of the United States in similar cases.

RULE NO. 9

A motion to suspend the Rules shall be in order only when made by authority of a majority of the Delegates from any State and seconded by a majority of the Delegates from not less than two (2) other States, severally.

RULE NO. 10

It shall be in order to lay on the table a proposed amendment to a pending measure and such motion, if adopted, shall not carry with it or prejudice such original measure.

RULE NO. 11

No member shall speak more than once upon the same question or longer than five (5) minutes, unless by leave of the Convention, except in the presentation of the name of a candidate for nomination for President or Vice President.

RULE NO. 12

Upon all subjects before the Convention the States, the District of Columbia, Puerto Rico, and the Virgin Islands shall be called in alphabetical order. Effective in 1972, Guam shall be added to the alphabetical list.

RULE NO. 13

The report of the Committee on Credentials shall be disposed of before the report of the Committee on Resolutions is acted upon, and the report of the Committee on Resolutions shall be disposed of before the Convention proceeds to the nomination of candidates for President and Vice President.

RULE NO. 14

(a) The Delegates from each State, elected to the National Convention, immediately after they are elected shall select from the delegation their members of the Resolutions, Credentials, Rules and Order of Business and Permanent Organization Committees of the National Convention, one (1) man and one (1) woman for each Committee, and shall file notice of such selection with the Secretary of the National Committee; provided, however, that no Delegate may serve on more than one (1) Committee of the National Convention. Alternates may not serve as members of the Convention Committees.

(b) All resolutions relating to the Platform shall be referred to the Committee on Resolutions without reading and without debate.

RULE NO. 15

When a majority of the Delegates of any six (6) States severally shall demand that a vote be recorded, the same shall be taken by the States in the order hereinbefore established.

RULE NO. 16

In making the nominations for President and Vice President and voting thereon, in no case shall the Call of the Roll be dispensed with. The total time of the nominating speech and seconding speeches for any candidate for President shall not exceed twenty-five (25) minutes. The total time of the nominating speech and seconding speeches for any candidate for Vice President shall not exceed twenty (20) minutes.

RULE NO. 17

When it appears at the close of the Roll Call that any candidate for the nomination for President or Vice President has received the majority of the votes entitled to be cast in the Convention, the Chairman of the Convention shall announce the question to be: "Shall the nomination of the candidate be made unanimous?" If no candidate shall have received such majority the Chairman shall direct the vote to be taken again and shall repeat the taking of the vote until some candidate shall have received a majority of votes.

RULE NO. 18

(a) In the balloting, the vote of each State shall be announced by the Chairman of the respective Delegations; and in case the vote of any State shall be divided, the Chairman shall announce the number of votes for each candidate, or for or against any proposition; but if exception is taken

by any Delegate to the correctness of such announcement by the Chairman of his Delegation, the Chairman of the Convention shall direct the roll of members of such Delegation to be called and the result shall be recorded in accordance with the vote of the several Delegates in such Delegation. No Delegate or Alternate shall be bound by any attempt of any State or Congressional District, the District of Columbia, Puerto Rico, the Virgin Islands, or Guam, to impose the unit rule.

(b) In the balloting, if any delegation shall pass when its name is called, then at the conclusion of the roll call all Delegations which passed shall be called in alphabetical order; and no Delegation will be allowed to change its votes until all Delegations which passed shall have been given a second opportunity to vote.

REPUBLICAN NATIONAL COMMITTEE

RULE NO. 19

(a) A National Committee shall be elected by each National Convention, called to nominate candidates for President and Vice President, and shall consist of two (2) members from each State, and an additional member as hereinafter provided, and shall have the general management of the affairs of the Republican Party in the United States and its territories subject to direction from time to time of the National Convention.

(b) The duly elected and acting Chairman of each State shall be a member of the National Committee during his tenure of office. In the foregoing sentence the word "State" shall not include the District of Columbia, Puerto Rico, the Virgin Islands or Guam.

(c) If the District of Columbia casts its electoral votes for the Republican candidate for President at the preceding Presidential election, the Chairman shall be a member of the Republican National Committee by virtue of his office as Chairman of the District of Columbia Republican Committee.

(d) Such additional member of the National Committee as above provided shall have full voting rights as a member of the National Committee while a member of said Committee.

RULE NO. 20

The roll shall be called and the Delegation from each State shall nominate, through its Chairman, one (1) man and one (1) woman to act as members of the National Committee.

RULE NO. 21

When the law of any State provides a method for the selection of members of the National Committee of political parties, the nomination of the members of the Republican National Committee

in accordance with the provisions of such law shall be considered nominations to be carried into effect by the Delegation from such State provided, however, that this rule shall not apply to the membership on the National Committee by the State Chairman.

RULE NO. 22

Where the laws of a State do not provide a method for the selection of members of the National Committee of political parties, instructions by State and District Conventions to Delegates to the National Convention as to nominations for membership in the National Committee shall be obeyed by such Delegates; and if not obeyed, may be made operative by a vote of the National Convention or referred to the National Committee with full power to act. It is provided, however, that this rule shall not apply to a State Chairman who is entitled to membership under Rule 19.

RULE NO. 23

When a majority of the Delegates from each State shall have so nominated a member of the National Committee, the Convention shall thereupon elect the person so nominated to serve as a member of the Committee until the meeting of the National Committee elected by the next National Convention.

RULE NO. 24

The National Committee shall issue the Call for the next National Convention to nominate candidates for President and Vice President of the United States at least four (4) months before the time fixed for said Convention; and Delegates and Alternates to such Convention shall be chosen in such manner, and the Call shall be issued and promulgated in such manner as the National Committee shall provide, but not, however, in a manner inconsistent with these Rules.

RULE NO. 25

The Officers of the National Committee shall consist of a Chairman; four (4) Vice Chairmen, who shall be two (2) men and two (2) women; a Secretary, a Treasurer, and such other officers as the Committee shall deem necessary, all to be elected by the National Committee. The Chairman shall appoint a General Counsel for the Committee and an Assistant Chairman, who shall be a woman and who shall be director of women's activities.

RULE NO. 26

The National Committee is authorized and empowered to select an Executive Committee, to consist of fifteen (15) members, in addition to which the Chairman, the Assistant Chairman, the Vice

Chairmen, the Secretary, the Treasurer, the General Counsel, the President of the National Federation of Republican Women, and the Chairman of the Young Republican National Federation, shall be ex officio members and the Chairman, with the consent of the National Committee, may appoint such other committees and assistants as he may deem necessary; whenever such committees are appointed they shall consist of a chairman, and an equal number of men and women.

RULE NO. 27

Vacancies in the National Committee shall be filled by the Committee upon the nomination of the Republican State Committee in and for the State in which the vacancy occurs; the National Committee shall, however, have power to declare vacant the seat of any member who refuses to support the nominees of the Convention, which elected such National Committee, and to fill such vacancy.

RULE NO. 28

The first meeting of the National Committee shall take place within fifteen (15) days after the convening of the National Convention electing such Committee, upon the call of the member oldest in time of service upon the previous National Committee; and thereafter upon call of the Chairman, or, in case of vacancy in the Chairmanship, upon call of the Vice Chairman, senior in time of service as a member of the National Committee, but such call shall be issued at least ten (10) days in advance of the date of the proposed meeting. Upon written petition of sixteen (16) or more members of the National Committee, representing not less than sixteen (16) States, filed jointly or separately with the Chairman, asking for a meeting of the National Committee, it shall be the duty of the Chairman within ten (10) days from receipt of said petition to issue a call for a meeting of the National Committee, to be held in a city to be designated by the Chairman, the date of such called meeting to be not later than twenty (20) days or earlier than ten (10) days from the date of the call.

RULE NO. 29

"Robert's Rules of Order Revised" shall govern in all meetings of the National Committee insofar as they are applicable and not inconsistent with these Rules. The Committee shall make its own rules governing the use of proxies at any meeting.

The Chairman of the Republican National Committee shall appoint a Committee of the Republican National Committee to review and study the Rules adopted by the 1968 Republican National Convention and the relationship between the Republican National Committee, Republican State Committees, and other Republican organizations, and implementation of the provisions of Rule

No. 32 which provides that participation in a Republican primary caucus, any meeting or convention held for the purpose of selecting delegates for a County or State or National Convention shall in no way be abridged for reasons of race, religion, color or national origin, and said Committee shall report with recommendations to the next Republican National Convention.

MEMBERSHIP IN THE NEXT NATIONAL CONVENTION

RULE NO. 30

The membership of the next National Convention shall consist of:

A. Delegates at Large

1. Four (4) Delegates at Large from each of the fifty (50) States.
2. Two (2) additional Delegates at Large for each Representative at Large in Congress from each State.
3. Nine (9) Delegates at Large for the District of Columbia and three (3) additional Delegates at Large for the District of Columbia if it casts its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election.
4. Six (6) additional Delegates at Large from each State casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election. If any State does not cast its electoral vote or a majority thereof for the Republican nominee in the last preceding Presidential election, but at that election or at a subsequent election held prior to the next Republican National Convention elects a Republican United States Senator or a Republican Governor or a Republican majority of the State's membership in the United States House of Representatives then in such event such State shall be entitled to such additional Delegates at Large.
5. Five (5) Delegates at Large for Puerto Rico, and three (3) Delegates at Large for the Virgin Islands, and three (3) Delegates at Large for Guam.

B. District Delegates

1. One (1) District Delegate from each Congressional District casting four thousand (4,000) votes or more for the Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.
2. One (1) additional District Delegate for each Congressional District casting twelve thousand five hundred (12,500) votes or more for the

Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.

C. ALTERNATE DELEGATES

One (1) Alternate Delegate to each Delegate to the National Convention.

ELECTION OF DELEGATES TO NATIONAL CONVENTION

RULE NO. 31

Delegates at Large to the National Convention and their Alternates and Delegates from Congressional Districts to the National Convention and their Alternates shall be elected in the following manner:

(a) By primary election in accordance with the applicable laws of such States as required by law, the election of Delegates to National Conventions of political parties by direct primary and in the District of Columbia in accordance with its law; provided, that in any of these in which Republican representation upon the Board of Judges or Inspectors of Elections for such primary election is denied by law, Delegates and Alternates shall be elected as hereinafter provided.

(b) By Congressional District or State Conventions, as the case may be, to be called by the Congressional District or State Committees, respectively. Notice of the Call for any such Convention shall be published in a newspaper or newspapers of general circulation in the Congressional District or State, as the case may be, not less than fifteen (15) days prior to the date of said Convention; provided, however, that in selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges, or denies to any citizen of the United States, eligible under the Constitution of the United States, to the office of President or Vice President, the right or privilege of being a candidate under such State law for the nomination for the President or Vice President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in these Rules.

(c) By the Republican State Committee or Governing Committee in any State in which the law of such State specifically authorizes the election of Delegates or Alternates in such manner.

(d) In a Congressional District where there is no Republican Congressional Committee, the Republican State Committee shall issue the Call and make said publication.

(e) All Delegates from any State may be

chosen from the State at Large, in the event that the laws of the State in which the election occurs, so provide.

(f) Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner and at the same time the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

(g) The election of Delegates and Alternates from the District of Columbia, Puerto Rico, the Virgin Islands and Guam shall be held under the direction of the respective recognized Republican Governing Committee therein in conformity with the Rules of the Republican National Committee or the laws of the District of Columbia, Puerto Rico, the Virgin Islands and Guam.

(h) Election of Delegates shall be certified in every case where they are elected by Conventions, by the Chairman and Secretary of such Conventions respectively and in case of election by primary, they shall be certified by the proper official, and all certificates shall be forwarded by said duly elected Delegates and Alternates in the manner herein provided.

(i) All Delegates or Alternates shall be elected not later than thirty-five (35) days before the date of the meeting of said National Convention, unless otherwise provided by the laws of the State in which the election occurs.

(j) Delegates and Alternates at Large to the National Convention shall be duly qualified voters of their respective States.

(k) Delegates and Alternates to the National Convention, representing Congressional Districts, shall be residents and qualified voters in said districts respectively.

ELECTION OF DELEGATES TO DISTRICT AND STATE CONVENTIONS

Delegates to Congressional District and State Conventions shall be elected under the following rules:

(l) Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting, or mass convention held for the purpose of selecting Delegates to a County, District, or State Convention, and only such legal and qualified voters shall be elected as Delegates to County, District and State Conventions; provided, however, that in addition to the qualifications provided herein the governing Republican Committee of each State, shall have the authority to prescribe additional qualifications not inconsistent with law. Such additional qualifications shall be adopted and

published in at least one daily newspaper having a general circulation throughout the State, such publication to be at least ninety (90) days before such qualifications shall become effective.

(m) No Delegates shall be deemed eligible to participate in any convention to elect Delegates to the said National Convention, who were elected prior to the date of the issuance of the Call for such National Convention.

(n) District Conventions shall be composed of Delegates who are legal and qualified voters therein, and Delegates to State Conventions shall be qualified voters of the respective districts which they represent in said State Conventions. Such Delegates shall be apportioned among the counties, parishes, and cities of the State or District having regard to the Republican vote therein.

RULE NO. 32

Participation in a Republican primary, caucus, any meeting or convention held for the purpose of selecting Delegates to a County, District, State or National Convention shall in no way be abridged for reasons of race, religion, color or national origin. The Republican State Committee or governing committee of each State shall take positive action to achieve the broadest possible participation in party affairs.

RULE NO. 33

No State shall elect a greater number of persons to act as Delegates and Alternates than the actual number of Delegates and Alternates respectively to which they are entitled under the Call, and no unit of representation may elect any Delegate or Delegates, or their Alternates, with permission to cast a fractional vote.

RULE NO. 34

(a) Thirty (30) days before the time set for the meeting of the National Convention, the credentials of each Delegate and Alternate shall be filed with the Secretary of the National Committee for use in making up the temporary roll of the Convention, except in the case of Delegates or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs rendering impossible filing of credentials within the time above specified. Notices of contests shall be filed in the same manner and within the same limit, stating the grounds of contest. Not less than twenty-two (22) days before the convening of the Republican National Convention, each of the contesting persons or groups shall file with the Secretary of the Republican National Committee at least three (3) printed or typewritten copies of the brief in support of their claim to sit as Delegates or Alternates in the National Convention. The Secretary of the Republican National Committee upon receiving the

brief of a contesting person or group shall furnish the opposing contesting person or group a copy of said brief.

Each brief shall begin with a summary of not more than one thousand (1,000) words setting forth succinctly a synopsis of the brief with page references and definitely stating the points relied on.

Where more than the authorized number of Delegates from any State are reported to the Secretary of the National Committee, a contest shall be deemed to exist and the Secretary shall notify the several claimants so reported, and shall submit all such credentials and claims to the whole Committee for decision as to which claimants reported shall be placed upon the temporary roll of the Convention; provided, however, that the names of the Delegates and Alternates presenting certificates of election from the canvassing board or officer created or designated by the law of the State in which the election occurs, to canvass the returns and issue Certificates of Election to Delegates to National Conventions of political parties in a primary election, shall be placed upon the temporary roll of the Convention by the National Committee.

(b) At the time of appointing the Arrangements Committee there shall be appointed by the Chairman of the Republican National Committee a Contest Committee, consisting of seven (7) members. There shall also be appointed a Committee on Rules. The Chairmen of the Contest Committee and the Rules Committee shall be members of the Arrangements Committee.

The Contest Committee shall make up a report of each contest filed, showing the grounds of contest, the statute and rule, if any, under which the contest is waged, and the contentions of each party thereto. The report shall conclude with a statement with the points of issue in the contest, both of fact and law, and shall be signed by the chairman. When the committee has prepared such report stating the issues of law and fact, a copy of the statement of such issues shall be forthwith submitted to a person in the convention city, whom the contestants must appoint at the time of filing the contest, to receive such statement; and a copy shall forthwith be served by the Chairman of the Contest Committee upon the contestants by registered mail.

The contestants shall have eight (8) days to file written objections to the committee's statement of the issues of fact or law or both, unless the committee of the whole is called to act upon the contest sooner in which case such objections shall be made before the first meeting of the whole committee; in case the contestants reside in the States of Alaska or Hawaii or Puerto Rico or the Virgin Islands or Guam they shall be entitled to ten (10)

days to file written objections. The objections shall contain any additional statement of issue of either law or fact, or both, claimed by the contestant submitting the same to be involved in, and necessary to be decided in the contest.

The Contest Committee shall hear and decide the same at once and make its decision as to what issues are involved and submit the issues arrived at, either law or fact, or both, to the National Committee sitting as a committee of the whole, and such issues shall be the sole and only issues passed upon and determined upon by the committee of the whole, unless the National Committee shall by a majority vote extend or change the same.

If the Contest Committee for any reason shall fail to state the issues either of law or fact, the National Committee shall decide upon what issues the contest shall be tried, and the hearing shall be limited to such issues, unless the National Committee by a majority vote shall decide otherwise.

(c) All contests arising in any State electing District Delegates by District Conventions, shall be decided by its State Convention, or if the State Convention shall not meet prior to the National Convention, then by its State Committee; and only contests affecting Delegates elected at Large shall be presented to the National Committee; provided, however, if the contest regarding a District Delegate arises out of the irregular or unlawful action of the State Committee or State Convention, the National Committee may take jurisdiction thereof and hear and determine the same under the procedure provided in Rule 34(b).

(d) The Delegates elected to the National Convention from each State shall, immediately after they are elected, select their members of the Credentials Committee of the National Convention and file notice of such selection with the Secretary of the National Committee. When the National Committee is called to pass upon any contest that may arise, the members of the Credentials Committee from each State shall also be notified of the time and place of such meeting and shall have the right to attend all hearings of all contests but without the right to participate in the discussion or to vote.

(e) If an appeal is taken from any ruling of the National Committee on any contest, notice of such appeal must be filed with the Secretary of the National Committee within twenty-four (24) hours after the decision and shall specify the grounds upon which the appeal is taken, and only the grounds so specified shall be heard by the Credentials Committee upon such appeal; and no evidence other than that taken before the National Committee shall be taken up by the Credentials Committee unless it shall, by a majority vote of all of its members, so direct.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1018

THE STATE OF GEORGIA, et al.,

Appellants,

-VS-

THE NATIONAL DEMOCRATIC PARTY,
et al.,

Appellees.

On Appeal from the United States District
Court for the District of Columbia

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

This brief is in reply to the Brief of the Republican National Committee and Mrs. J. Willard Marriott,[1/] the Brief of Carl L. Shipley (Republican National Committeeman for the District of Columbia), and the Brief for Appellees the

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1. Hereinafter referred to as the Republican defendants.

National Democratic Party, the Democratic National Committee, Flaxie M. Pinkett and Channing E. Phillips.[2]

This Is A Voting Rights Case

All of those defendants (appellees) have unanimously characterized this case erroneously. That erroneous characterization, unless corrected, could be misleading to the Court.

The Republican defendants have said: "The selection of a candidate by the delegates at the Republican National Convention. . . does not involve the selection of a person to perform governmental functions. . . ." (Brief of the Republican National Committee, at 8).

Mr. Shipley has said: "The action bears no reference to the election of any state official" (Brief of Carl L. Shipley, at 4).

The Democratic defendants have said: "This is not a case involving votes for election to public office" (Brief of the National Democratic Party, at 4).

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2. Hereinafter referred to as the Democratic defendants.

The President performs governmental functions. The presidency is a public office. Presidential electors perform governmental functions. The office of presidential elector is a public office, not a federal but a state office.[1]

The defendants see this action as relating ". . . solely to the allocation of delegate strength among the states for conventions of national political parties" (Brief of the National Democratic Party, at 4, underscoring added; see also Brief of Republican National Committee, at 3; Brief of Carl L. Shipley, at 3). The defendants have focused on reapportionment of their political conventions. Hence, they see this case as being "political".

The defendants have not focused on the real issue - the rights of voters. The rights of voters are justiciable, as the Supreme Court has repeatedly held. Baker v. Carr, 369 U.S. 186 (1962), McPherson v. Blacker, 146 U.S. 1 (1892).

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1. See Fitzgerald v. Green, 134 U.S. 377, 379 (1890), McPherson v. Blacker, 146 U.S. 1, 35 (1892).

The plaintiffs in this case are voters (App. 7). This is a class action on behalf of Georgia voters (App. 8). Georgia voters are limited in voting their choice for the office of President to defendants' nominees (App. 13), because defendants have a 100 year monopoly on nominating Presidents (App. 13). Georgia voters are underrepresented at defendants' nominating conventions by reason of defendants' (mal)apportionment formulas (App. 13, 25). Hence, Georgia voters' votes are diluted and their right to vote is impaired in presidential elections, by defendants' apportionment formulas (App. 26).

That this is a voting case is made clear by the complaint (App. 7-8, 26). It was made clear to the court below in oral argument (R. 65, tr. 36). It was made clear in our original brief to this Court (Brief for Appellants, at 1, 3, 5, 8).

Having established, we believe, that this is a voting case, involving the election of governmental officials, we would like to quote the Democratic defendants' statement of the meaning of Hadley v. Junior College District, 397 U.S. 50 (1970), (Brief of National Democratic Party, at 10):

"Thus, whenever a state commits itself to a popular election of governmental officials [Presidential Electors], the Equal Protection Clause requires that every voter should have an even chance to make his vote count and every citizen should be equally represented." (Italics in original, brackets added.)

We agree.

Two Issues Have Been Resolved

Before considering what the defendants have said in their briefs, we believe it worthwhile to note what they have not said. In our original brief, we devoted one section, entitled "The Court Below Misconstrued the Only Supreme Court Decision It Cited", to Powell v. McCormack, 395 U.S. 486 (1969). We pointed out that the Powell decision held that where declaratory judgment is sought (as it is here), it should be granted even if coercive relief were found to be inappropriate (Brief for Appellants, at 14).

In their three briefs, not one of the defendants even cited

Powell, much less attempted to refute it or to defend the error of the court below.

Moreover, not one of the defendants pointed out any fact in dispute in this case. There is no issue as to any material fact, and plaintiffs' motion for summary judgment was in order.

REPUBLICANS' CONTENTIONS

The Republican defendants have said (Brief of Republican National Committee, at 10-11):

> "Unlike a legislative body, the function of the national convention is not to represent equally all persons within a given geographic area. The individual delegates to the national convention are chosen by other Republicans, whether it be by primary election or state party convention, and it is only these Republicans, and not the entire populace who are represented at the convention. . . .
>
> In choosing this candidate, it cannot seriously be contended that the Republican National Convention or the delegates to the national convention should be sensitive to the wishes of all persons in every state on an equal basis.

> Quite clearly, the delegates to the convention, in choosing a candidate, are acting in a manner which in fact they hope will be adverse to the interests of a great many persons from the particular state they represent. To say that these people should be equally represented at the convention misses entirely the purpose and function of a national political convention."

Such candor is admirable, but that is a description of the injustice this suit seeks to correct. That is a rewrite of the question in this case, not (we sincerely hope) the answer. It is seriously contended that a National Convention, in selecting that man whom the voters must vote for or against, should be sensitive to all persons in every State on an equal basis.

State Action

The Republican National Committee and Mrs. Marriott have argued first that the one man - one vote requirement is not applicable to political conventions. Upon analysis, it is seen that their primary contention is in essence that there is no "state action" involved, at least in the national conven-

tions themselves.[1]

"State action" is definitely involved, as shown by the argument made by the Republican defendants themselves.

The Republican defendants say that the delegate selection process involves two stages. They say the first stage is the decision of the 1968 convention delegates as to how many delegates each State and territory will be entitled to have at the 1972 convention. Then, they say(Brief of Republican National Committee, at 4):

> "Thereafter each state determines how its allocated number of positions will be filled. Various methods are employed to choose the individual delegates from each state, but essentially this is done either by state primary, by state political convention, or by appointment by some state political committee." (Underscoring added.)

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1. Note the Republican defendants' attempt to distinguish the "Texas white primary" cases at p. 5 of their brief, on the ground that those cases involved discrimination in primaries and not in conventions. Defendant Shipley joins the Republican defendants in their "State action" argument. Brief of Carl L. Shipley,at 3-4.

There is the "state action". (See plaintiffs' Complaint, par. 43, App. 23. See also plaintiffs' Complaint, pars. 36-51, App. 19-25. Those allegations are supported by uncontroverted evidence in the record of this case. R. 44.)

Primaries, used by 11 States to select convention delegates, constitute "state action". United States v. Classic, 313 U.S. 299 (1941).

State political conventions, used by 30 states to select delegates, constitute "state action". Smith v. Allwright, 321 U.S. 649 (1944).

The action of state political committees, used by 4 states, constitutes "state action".[1/] Nixon v. Condon, 286 U.S. 73 (1932).

Contrary to the Republican defendants' contention, the States have delegated aspects of the presidential election process to the defendants in this case. See Evans v. Newton, 382 U.S. 296,

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1. Four remaining states use a combination of these methods. See Brief for Appellants, at 24-26.

299, (1966), Terry v. Adams, 345 U.S. 461 (1953). Aside from the "state action" involved in selecting the convention delegates (see above), the names of defendants' nominees automatically go on the general election ballots in 48 States simply because State laws provide that the names of defendants' nominees shall go on those ballots, and in the two remaining States the names of presidential electors representing the defendant political parties are entitled under State law to be placed on the ballot (App. 24).

There is "state action" here. Thus, the questions of malapportionment and reapportionment are presented here.

The Republican defendants also have asserted (Brief of Republican National Committee, at 4) that:

> "The Plaintiffs have tried to place this case in a posture in which the Court will conclude that the states control the 1972 Republican National Convention. . . ."[1/]

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1. See also Brief of Carl L. Shipley, at 3-4.

We do not contend that such state control is even necessary. See Nixon v. Condon, Smith v. Allwright, and Terry v. Adams, supra, where the "control" was in the party, not the state. It is not necessary that there be State "control" in order to have "state action". Where there is "state action", a court action will lie.

Invidious Discrimination

At the 1968 Republican Convention there were 1,333 voting delegates (App. 30). At the 1972 Republican Convention, there will be more delegates by virtue of the Republican victory in 1968 and the 42 states which will receive six bonus votes each (Brief of Republican National Committee, at 15).

Even with only 1,333 votes, based upon population Georgia voters would be entitled to 30 votes at the 1972 Republican Convention, whereas we will have only 24 votes. We will be underrepresented by 6 votes, or by 25%. As the size of the convention increases, this underrepresentation will increase. The Supreme Court has held a 3.13% underrepresentation to be invidious and invalid. Kirkpatrick v. Preisler, 394 U.S. 526, 529, fn 1 (1969).

Vote dilution is a legal injury for which an action will lie. Baker v. Carr, 369 U.S. 186 (1962), Reynolds v. Sims, 377 U.S. 533 (1964).

The Republicans have sought to justify underrepresentation by saying (Brief of Republican National Committee, at 17) that if delegates to the 1972 Conventions were allocated on the basis of population alone, the delegates from the nine largest states would control both Conventions. That is just a way of saying: We fear the majority. We (the plaintiffs) do not. The only constitutional protection small states are entitled to have is in the Senate and the Electoral College. Gray v. Sanders, 372 U.S. 368, 376-378 (1963). Moreover, the "unit rule" has been abolished, and it would be extraordinary for any large delegation to be unanimous, or for the large delegations (New York and Michigan and Texas and Florida, for example) to agree with each other, at anytime except the last ballot. Seven of the ten largest states have presidential primaries, and if one man were to win all those primaries, he is certain to be the nominee in any event.

Moreover, it is an invidious discrimination to underrepresent large groups of people, or small ones.

DEMOCRATS' CONTENTIONS

The one thing which can be said about the proposed 1972 Democratic apportionment formula is that they changed the terminology. They now call it their "allocation formula" (Brief of National Democratic Party, at 8), whereas formerly they called it their "apportionment formula" [R 6, 28; Democratic National Committee Rule 2(g)(3)]. They have applauded themselves for not using, in 1972, "victory bonus" votes (Brief of National Democratic Party, at 9 and 23), yet they still give "popular bonus" votes, although now they call them "additional convention votes" (Brief of National Democratic Party, at 8 and A-2). Still, Alaska voters are overrepresented by 55.15% and Georgia voters are underrepresented by 28.54% (see Appendix A).

Normally, we would commend the Democrats for preserving the relations of the United States with the Canal Zone, Guam, the Virgin Islands and Puerto Rico (Brief of National Democratic Party, at 9, 15, 26), but we cannot do so when they are overrepresented and Georgians are underrepresented by 28.54%. We suspect that the purpose is not territorial "good will" but is a "reflection of the policies and objectives" of the Democratic Party (Brief of National Democratic Party, at 11), at

the expense of underrepresented voters in Georgia and other states (Appendix A). Such "good will" should come from Congress and the State Department, not in the form of vote dilution by the Democrats.

Judicially Manageable Standards

The Democratic defendants have said that: "There is a wide variety of strongly held views among political figures, scholars and other as to what allocation method should be employed by the Democratic Party. In a free democratic society such as ours resolution of those conflicting views is best achieved through political processes." (Brief of National Democratic Party, at 12). As the Supreme Court held in Lucas v. Colorado General Assembly, 377 U.S. 713, 736-737 (1964), a citizen's constitutional rights cannot be infringed simply because a majority of the people choose that they be. Certainly a citizen's constitutional rights cannot be infringed when those in power cannot agree on the method of infringement.

The Democrats have argued for flexibility and freedom in their "delegate allocation formula" (Brief of National Democratic Party, at 13).

They want flexibility and freedom to penalize voters who think their candidates, chosen in the malapportioned conventions, were not the best candidates. They want flexibility and freedom to penalize dissent. They want flexibility and freedom to over-represent "safe" delegates. They want flexibility and freedom to continue in power so that they can do it all over again and again. Fortunately, the Twenty-Second Amendment prohibits monarchy in the Office of President, and the Fourteenth Amendment, we submit, prohibits his selection by royalty.

Plaintiffs do not contend that so-called third parties holding conventions must apportion them on the basis of "one man - one vote". In the first place, there are no third parties in presidential races. The two political parties which are defendants in this case have a 100 year old monopoly on selecting the President (App. 13). Only those political parties which are an integral part of the presidential election process would be required to apportion their conventions on a "one man - one vote" basis.

It is interesting to note that the Democratic defendants have attempted to justify malapportioned conventions upon the 1912 Republican Convention (Brief of National Democratic Party,

at 14). The Democrats have not attempted to justify their own progress at malapportionment since 1944 (Brief of National Democratic Party, at 24-25), when they began to award victory bonus votes (R. 41).

Moreover, the Democrats point out that the cause of the malapportionment in the 1912 Republican Convention was the "allocation of delegates. . . on the basis of votes in the Electoral College" (Brief of National Democratic Party, at 14). Such allocation is challenged by the plaintiffs in this suit and is defended by the Democratic defendants, as about half their apportionment formula, at pp. 24-25 of their brief. Following the malapportionment of the Electoral College is not a legal basis for not following the "one man - one vote" rule. Gray v. Sanders, 372 U.S. at 378.

There is no justification for malapportionment. There is no justification for vote dilution. There is no justification for overrepresentation or underrepresentation. There is justification for "one man - one vote".

THE IRISH, SMITH AND MAXEY DECISIONS

The defendants have relied heavily on Irish v. Democratic-

Farmer-Labor Party of Minnesota, 287 F.Supp. 794 (D.Minn. 1968). In that case, the plaintiffs sought to have the election (by the Minnesota democratic state convention) of delegates to the Democratic National Convention declared void, just 25 days prior to the National Convention. The District Court denied relief, expressing three grounds for denial: (1) Inasmuch as the National Convention itself was malapportioned, and the National Democratic Party was not a party to the suit, the Court could not grant complete relief and would not disrupt the middle echelon; (2) the matter involved a political question; and (3) the court would not grant retrospective relief, unseat elected delegates to the National Convention, and require the holding of a new state convention.

The plaintiffs in this case do not necessarily disagree with that decision, and in fact there is much in it which we applaud. The defendants interpret the Irish decision as being based solely on the political question ground, which it was not. Moreover, in Irish, the plaintiffs sued as follows:

> "Plaintiffs are residents, registered voters and taxpayers of the County of Ramsey, State of Minnesota who participated in and voted at the precinct caucus elections of the Democratic-

Farmer-Labor Party on March 5, 1968. That thereafter, some of the plaintiffs did further participate as elected delegates at the County, District, Legislative District and State conventions of the defendant Democratic-Farmer-Labor Party held in the months of March, April, May and June, 1968." (Paragraph II of the plaintiffs' complaint in Irish v. D.F.L. Party of Minnesota, underscoring added.)

Thus, the plaintiffs in Irish asserted their rights as participants in the caucuses and conventions of the party, not their rights as voters. The Irish plaintiffs chose to show infringement of their political rights, to wit:

". . . their right to participate and vote in said precinct caucus, county, District, Legislative District and State Conventions of the defendant Democratic-Farmer-Labor Party and to elect delegates and presidential electors to represent them and others similarly situated to the 1968 Presidential Nominating Convention of the Democratic Party, and to otherwise participate in the presidential nominating election

processes provided by law. . . ." (Paragraph XII of the plaintiffs' complaint in Irish, supra, underscoring added.)

The primary complaint of the plaintiffs in Irish was infringement of their right to vote in party caucuses and conventions, rather than infringement of their right to vote in presidential elections. The Irish plaintiffs chose to allege an intra-party deprivation of rights, in an effort to secure their objective of additional delegate support for the presidential candidate of their choice. The Irish Court may well have been correct that that case involved a political question, an intra-party dispute between two political groups competing for control of the Minnesota delegation to the 1968 Democratic National Convention. "Selection of Delegates", 37 U. Chicago L.R. 536 (1970), citing Report of the Minnesota credentials dispute in Cong. Quar. Service, The Presidential Nominating Conventions 1968, at 102-3 (1968).

In any event, understanding the Irish plaintiffs' claims as party participants makes clear the Irish Court's opinion where the District Judge found that their one man - one vote right had been satisfied when they were accorded it at the pre-

cinct caucus level. (Plaintiffs had voted therein as party members.) The same is true of the Circuit Court's opinion, Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (8th Cir. 1968), decided 13 days before the 1968 Democratic Convention. The non-justiciable, political question in Irish was not reapportionment. It was that the Court had no means, within the time available, to decide which faction should have the balance of power.

The case at bar does not present the difficulties faced by the Irish Court. We are dealing here not with the middle echelon but with the source of the problem, and we do not seek to disrupt the 1972 conventions. We seek, simply and timely, to have the defendants conduct those conventions fairly, on the basis of one person - one vote.

The Republican defendants have sought to rely on another decision, Smith v. State Executive Committee of Democratic Party, of Georgia, 288 F.Supp. 371 (N.D.Ga. 1968). There the plaintiffs sought to attack party rules which authorized the party's gubernatorial nominee to appoint one-half of the members of the State committee and to appoint the delegates to the national convention. The plaintiffs alleged that they were "perennial

members of such Party" (complaint, par. 8), and challenged the delegate rule on the ground that it did "not even remotely purport to afford to the general constituency of the Democratic Party of Georgia any reasonably effective voice in the choosing of the membership of such delegation, either directly or reasonably indirectly, upon any standard of equality" (complaint, par. 13). The suit was brought on behalf of plaintiffs and "other constituent members of the Democratic Party in the State of Georgia entitled to participate in its affairs. . ." (complaint, par. 18); i.e., the suit was brought on behalf of intra-party participants.[1/]

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1. In a companion case, Marsh v. State Democratic Executive Committee of the Democratic Party of Georgia, 288 F.Supp. 371 (N.D. Ga. 1968), the plaintiffs attacked the delegate selection rule, alleging that some of them "desire to vote for Mr. Humphrey and some for Senator McCarthy. . ." (complaint, par. 7). The rule governing the composition of the state committee (which committee had adopted the delegate selection rule), having been adopted in an "open" (one man - one vote) convention, the Court denied relief (three days before the national convention). In the case at bar the Republican apportionment formula was adopted by its malapportioned 1968 Convention and the Democratic "allocation formula" was adopted by its malapportioned National Committee.

The law reviewers are critical of Irish and Smith, 78 Yale L.J. 1228, 1232-1233, 1243-1244 (1969); 56 Va. L.R. 179, 191-195 (1970); 64 Northwestern U.L.R. 915, 919-921, 925 (1970); 54 Iowa L.R. 471, 478 (1968), but when those cases are properly analyzed they do no damage to the law. There, the plaintiffs sought to litigate from within the party, as participants therein. The questions they raised may have been political questions.

It is interesting to note that in "Reform of Delegate Selection", 64 Northwestern U.L.R. 915, 920 (1970), the reviewer states:

> "The Supreme Court has not invoked the political question doctrine in an apportionment case subsequent to Baker v. Carr."

By its per curiam opinion in Dahl v. Republican State Committee, 393 U.S. 408 (1969), the Supreme Court preserved plaintiffs' right to seek a properly apportioned state political convention, and set the stage for Maxey, infra ("Selection of Delegates to Conventions", 78 Yale L.J. 1224, 1244, n. 61 1969).

Maxey v. Washington State Democratic Committee, 319 F.Supp. 673 (W.D. Wash. 1970), was a companion to Dahl. In Maxey, the District Court held that a state convention of a

political party at which delegates to the National Convention are elected, must be reapportioned. There the plaintiffs sued as voters. 319 F.Supp. at 674.

The plaintiffs in the case at bar, like the Maxey plaintiffs, are suing to protect their rights as voters, not as participants within the political parties as in Irish and Smith, supra. The rights of voters are clearly justiciable. Baker v. Carr, 369 U.S. 186, 198 (1962), McPherson v. Blacker, 146 U.S. 1, 23-24 (1892).

The Democratic defendants have attempted to distinguish Maxey, supra, on the basis that there the Court invalidated an apportionment formula based on an equal number of "basic votes" for each county. (Brief of National Democratic Party, at 17, fn. 15). They have said that that Court struck down "certain practices not involved in the allocation formula of the National Democratic Party before the court in this case" (Brief of National Democratic Party, at 17). Actually, the first factor in the "allocation formula" of the Democratic National Committee now before this Court is a"basic vote" provision identical to that held invalid in Maxey.

The "basic vote" provision of the apportionment formula in Maxey was (319 F.Supp. at 675):

> "Each county is customarily allotted a certain number of basic delegate votes (five in 1968). Each county is also allowed five votes for each state senatorial district within its boundary and one for each twenty per cent of the county's population encompassed by a district covering more than one county."

The first factor in the Democratic "allocation" formula now before this Court is:

> Each State is allotted a certain number of basic delegate votes (six; three for each of its two Senators). Each State is also allowed three votes for each congressional district within its boundaries.

The Democratic defendants call this their electoral college factor but it is actually a "basic vote" provision identical to that held invalid in Maxey.[1/]

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1. The Republican apportionment formula also has a "basic vote" provision, 4 votes for each State.

The Democratic defendants have sought to distinguish Maxey further, and to uphold the court below, on the basis that there was in the State of Washington, they contend, a statutory commitment to the "popular election" of delegates to the National Convention (Brief of National Democratic Party, at 21). (See also Brief of Carl L. Shipley, at 7). By "popular election", the Democrats mean "presidential primary" (Brief of National Democratic Party, at 21, fn. 18). Yet there is no presidential primary in the State of Washington. They use the convention system for selecting delegates to national conventions (R. 44; Nomination and Election of the President and Vice President of the United States, pp. 63, 146).

The Maxey decision cannot be distinguished (as the Court below and the Democratic defendants have sought to do) from the case at bar on the basis that here there is no statutory commitment to popular election. There is a statutory commitment by every State in the Union to the popular election of presidential electors (App. 24).

The court below erred in not following Maxey.

THE NATIONAL REPUBLICAN PARTY IS ALIVE AND ACTIVE IN WASHINGTON, D.C.

As for the Republican defendants' argument that the National Republican Party is "a meaningless name which describes no known organized group" (Brief of Republican National Committee, at 20), we believe the Party should speak for itself, rather than through third persons who may not know what their Party is.

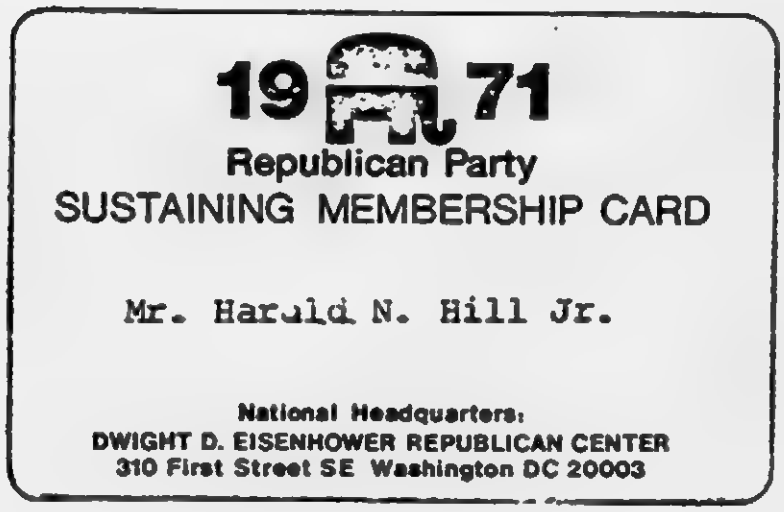
To prove the existence of the Republican Party, we introduced three exhibits in the court below (R. 65, tr. 78-90; R. 64, plaintiffs' exhibits 1, 2 and 4), as follows (R. 64):

Plaintiffs' exhibit 1 - Invitation to become an "official member" of the Republican Party, ". . . the fastest growing political party in the U.S.A."

Plaintiffs' exhibit 2 - Membership card in the "REPUBLICAN PARTY" with headquarters in Washington, D. C.

Plaintiffs' exhibit 4 - Cancelled check made payable to the "Republican Party".

Since that hearing, the Republican Party has continued to issue cards showing "Membership" in the "Republican Party":



And, it has continued to dun those who do not contribute (See Appendix B to this Brief). According to their "Second Notice" (Appendix B):

> "We all know that what it takes to win elections is a strong, active political organization. We must keep the National Republican Party going full speed during 1971 if we are to win the crucial 1972 Presidential election. We are busy now building our organization up for that election. As I know you can appreciate, this takes money. That is why I am calling again for your help." (Underscoring in original.)

If it were true, as the Republican defendants have contended, that between Conventions "the only national Republican organization in existence is the Republican National Committee" (Brief of Republican National Committee, at 19), then somebody would be guilty of soliciting money under false pretenses. However, the Complaint in this case was served on that somebody, to wit: the National Republican Party (App. 32).

In her affidavit, Miss Good states that she is an employee of the "Republican National Committee" (App. 60). She says that she is not an employee of the "National Republican Committee" (App. 60).[1/] She did not say that she is not an employee of the National Republican Party (App. 60).

Regardless of whether she is an employee of the Party, the Republican National Committee is the general manager of the National Republican Party (Republican Rule 19(a), R. 8, R. 38, or Appendix A to Brief of the Republican National Committee). Service upon Miss Good was service upon the general manager of the Party. Rule 4(d)(3), F.R.C.P.

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1. If the contention were that there is no organization known as the "National Republican Committee", we would agree.

We submit that the real National Republican Party should stand up, admit its existence and the error of the court below, and get on with the merits of this controversy.

CONCLUSION

The equal protection clause is applicable to political party primaries which are an integral part of the election process. We submit that it is equally applicable to party conventions which are an integral part of the presidential election process. The presidency is a public office. Presidential electors are public officers.

The defendant political parties determine who will be the President of the United States. Between the two of them, they choose the President, because they choose whom the people can elect. The power of choosing the President is not a private right of the defendants. It is a public right.

If the States cannot diffuse political initiative as between its thinly populated, agricultural communities and its concentrated urban centers (and they cannot), by what right do the defendants diffuse it as between thinly populated western states and concentrated urban states? If one man - one vote is right for local, congressional and state elections, then it is right for national elections.

The reapportionment of badly malapportioned national conventions will come not from the political parties. Only a court will cut the voting power of those entrenched by the present scheme so as to equalize it among those whose votes are now diluted and debased.

The decision of the court below should be reversed.

Respectfully submitted,

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STATE	RANK	1970 POPULATION	% OF POPULATION	PROPORTION OF 3016	DEMO CONVENTION VOTE	OVER (UNDER)	% VARIANCE FROM NORM
labama	21	3444165	1.70	51	37	(14)	+ 38.17
aska	51	302173	.15	5	10	5	- 55.15
zona	33	1772482	.87	26	25	(1)	+ 5.24
kansas	32	1923295	.95	29	27	(2)	+ 5.74
lifornia	1	19953134	9.82	296	271	(25)	+ 9.29
lorado	30	2207259	1.09	33	36	3	- 8.99
nnecticut	24	3032217	1.49	45	51	6	- 11.75
laware	47	548104	.27	8	13	5	- 37.42
strict of Columbia	41	756510	.37	11	15	4	- 25.14
rida	9	6789443	3.34	101	81	(20)	+ 24.42
rgia	15	4589575	2.26	68	53	(15)	+ 28.54
waii	40	769913	.38	11	17	6	- 32.77
aho	43	713008	.35	11	17	6	- 37.74
inois	5	11113976	5.44	165	170	5	- 1.72
diana	11	5193669	2.56	77	76	(1)	+ 1.04
wa	25	2825041	1.39	42	46	4	- 3.84
nsas	28	2249071	1.10	33	35	2	- 5.00
ntucky	23	3219311	1.58	48	47	(1)	+ 6.13
uisiana	20	3643180	1.79	54	44	(10)	+ 22.91
ine	38	993663	.49	15	20	5	- 26.27
ryland	18	3922399	1.93	58	53	(5)	+ 9.85
ssachusetts	10	5689170	2.80	84	102	18	- 11.27
chigan	7	8875083	4.37	132	132	0	- .05
nnesota	19	3805069	1.87	57	64	7	- 11.73
ssissippi	29	2216912	1.09	33	25	(8)	+ 31.63
souri	13	4677399	2.30	69	73	4	- 4.38
ntana	44	694409	.34	10	17	7	- 39.37
braska	35	1483791	.73	22	24	2	- 6.74
vada	48	488738	.24	7	11	4	- 34.05
w Hampshire	42	737681	.36	11	18	7	- 39.15
w Jersey	8	7168164	3.53	106	109	3	- 2.38
w Mexico	37	1016000	.50	15	18	3	- 16.30
w York	2	18190740	8.95	270	278	8	- 2.87
th Carolina	12	5082059	2.50	75	64	(11)	+ 17.87
th Dakota	46	617761	.30	9	14	5	- 34.50
o	6	10652017	5.24	158	153	(5)	+ 3.34
lahoma	27	2559253	1.26	38	39	1	- 2.59
gon	31	2091385	1.03	31	34	3	- 8.70
nsylvania	3	11793909	5.80	175	192	7	- 3.81
de Island	39	949723	.47	14	22	8	- 35.92
th Carolina	26	2590516	1.27	39	32	(7)	+ 20.17
th Dakota	45	664267	.33	10	17	7	- 41.82

APPENDIX A

	RANK	1970 POPULATION	% OF POPULATION	PROPORTION OF 3016	DEMO CONVENTION VOTE	OVER (UNDER)	% VARIANCE FROM NORM
ennessee	17	3924164	1.93	58	49	(9)	+ 18.88
exas	4	11196730	5.51	166	130	(36)	+ 27.85
tah	36	1059273	.52	16	19	3	- 17.25
ermont	49	444732	.22	7	12	5	- 44.99
irginia	14	4648494	2.29	69	53	(16)	+ 30.19
ashington	22	3409169	1.68	51	52	1	+ 2.68
est Virginia	34	1744237	.86	26	35	9	- 26.03
isconsin	16	4417933	2.17	66	67	1	- 2.12
yoming	50	332416	.16	5	11	6	- 55.14
ral zone					3	3	-100.00
am					3	3	-100.00
erto Rico					7	7	-100.00
rgin Islands					3	3	-100.00
		203184772	99.96	3016	3016	0	

AL (MEAN) POPULATION PER
VENTION VOTE: 67,369

IMUM OVER AND UNDER
RESENTATION FROM IDEAL:
LASKA 55.15 OVER-REPRESENTED
LABAMA 38.17 UNDER-REPRESENTED

O OF MOST POPULOUS STATE (MOST
LE PER VOTE) TO LEAST POPULOUS STATE:
.08 (ALASKA) TO 1 (ALABAMA)

RAGE POPULATION DIFFERENCE BETWEEN
T POPULOUS STATE AND LEAST
POPULOUS STATE: 62,869

APPENDIX A

1971 Sustaining Membership

REPUBLICAN NATIONAL COMMITTEE

Enclosed is my 1971 membership contribution to the National Republican Party. I understand that I will be receiving the Party's official publication, THE REPUBLICAN, which will be delivered to my home.

☐ Personal check is enclosed.
Made out to
REPUBLICAN ACTION FUND
(Note: Corporate checks prohibited by law.)

*If your contribution is for $25 or more, you also receive MONDAY, the weekly Newsletter of the Republican Party.

Mr. Harold N. Hill Jr.
455 Forrest Vly Ne
Atlanta, GA 30305

SECOND NOTICE

Please return top portion of this letter in accompanying reply envelope with your payment.
No postage required.

16A
11115993

Detach along dotted line

Your contribution last year was $10.00
Suggested 1971 contribution $15.00

Dear Mr. Hill:

Your 1971 Sustaining Membership Card was mailed to you several weeks ago. I hope you have added it to the other valuable cards in your wallet -- and that you will keep it as a reminder of our gratitude here at National Headquarters for the generous help you have given in the past.

Secondly, the card is a reminder of the important job ahead this year for us, for you and for all Republicans. We've sent you the card because we are sure you'll want to continue as a Sustaining Member in 1971.

We all know that what it takes to win elections is a strong, active political organization. We must keep the National Republican Party going full speed during 1971 if we are to win the crucial 1972 Presidential election. We are busy now building our organization up for that election. As I know you can appreciate, this takes money. That is why I am calling again for your help.

So -- if you haven't already done so -- I hope you'll return your 1971 Sustaining Membership contribution in the amount indicated above -- or more, if you can -- today.

Many thanks -- in advance -- for your ongoing support.

Appreciatively,

Jeremiah Milbank Jr.

Jeremiah Milbank, Jr.

OFFICE OF THE CHAIRMAN • REPUBLICAN NATIONAL FINANCE COMMITTEE

APPENDIX B

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for the appellants in the above styled case and that I have this day served the foregoing Reply Brief for Appellants upon the appellees by mailing two true copies thereof to each of their attorneys of record, at their known addresses, postage prepaid, as follows:

Alexander E. Bennett, Esquire, Arnold & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. 20036;

Fred C. Scribner, Jr., Esquire, Pierce, Atwood, Scribner, Allen & McKusick, 465 Congress Street, Portland, Maine 04111;

John Barry Donohue, Jr., Esquire, Shipley, Akerman, Pickett, Stein & Kaps, 1108 National Press Building, Washington, D. C. 20004.

This _____ day of March, 1971.

_____

HAROLD N. HILL, JR.

Of Counsel for Appellants